United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,269

F 499

JOSEPH YOUNG, JR.

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 10 1966

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(APPOINTED BY THIS COURT)

November 10, 1966

STATEMENT OF QUESTIONS PRESENTED

1. Whether, in a prosecution for housebreaking and larceny, the trial judge erred in denying a motion for a mistrial or continuance based on the fact that the defendant's key witness, a co-defendant who had already pleaded guilty and was awaiting sentence, was temporarily unavailable because of his refusal to testify until the second count of the indictment against him had been formally dismissed?

2. Whether it was prejudicial error for the trial judge, having refused to continue the trial until the testimony of defendant's key witness became available, then to allow the prosecution to bring before the jury, in order to impeach defendant's own testimony concerning the facts to which the key witness would have testified, evidence of a prior unrelated felony of which the defendant had been convicted while a juvenile?

3. Whether the trial court committed reversible error by failing to instruct the jury that guilty knowledge and purposive participation in the commission of the offense are essential elements of the crime of aiding and abetting, and by emphasizing the presumption raised by the government's evidence while virtually neglecting Appellant's exculpatory testimony?

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TABLE OF AUTHORITIES

* Cases chiefly relied on are marked by asterisks.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for violations of Title 22, Sections 1801 and 2201 of the District of Columbia Code (Housebreaking and Larceny). Appellant was indicted on September 7, 1965. On his plea of not guilty, he was tried before a jury in the United States District Court for the District of Columbia. Judgment and sentence were entered May 16, 1966. On May 19, 1966, Appellant requested leave in the District Court to proceed on appeal in this Court in forma pauperis, which

was granted on June 14, 1966. Jurisdiction of this Court to review the judgment below rests on 28 U.S.C. §1291.

STATEMENT OF THE CASE

Appellant was arrested in his automobile at about 4:15 a.m. on August 21, 1965 while he was stopped for a traffic light at 14th and Constitution Avenues, N.E. Arrested with him was a companion in his automobile at the time, Thomas N. Williams (Tr. 41-42, 51-52).* The arresting officers, Detectives Hill and Bowie of the Metropolitan Police Force, were acting on information received by them from the police radio dispatcher (Tr. 48-49). Appellant and Williams were ordered out of the automobile and the police officers conducted a search of it. In the trunk they found a calculating machine and a typewriter which later were determined to have been stolen earlier that morning from the Excelsweld Company at 118 - 12th Street, N.E. (Tr. 44-47).

At trial on March 29 and 30, 1966 the following facts were developed: On or about 4:05 a.m. on August 21, 1965, the Metropolitan Police received a telephone call from Mrs. Claudius Rowe, who lived with her husband across the street from the Excelsweld Company. Mr. Rowe testified that he had been awakened by his wife and the two of them observed that someone had broken into the Excelsweld Company and was removing machines from the premises (Tr. 26-27). The exact time Mr. Rowe was awakened is in considerable doubt. Although at the trial he at first said it

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* "Tr." refers to the transcript of the trial.

was around 4:00 a.m., he admitted later upon cross-examination that in an earlier proceeding in the Court of General Sessions on August 24, 1965 (only three days after the event) he had testified that he observed the housebreaking taking place about 2:30 or 3:00 a.m. (Tr. 26-27, 33-34). He finally conceded after still further questioning that "actually, all I know, all I can say about the time is the late part of the morning" (Tr. 37).

Mr. Rowe further testified that after the machines were removed, an automobile drove up, another individual stepped out, and the two men proceeded to load the machines in the back seat of the automobile and drove away. As they drove away, Mr. Rowe was able to observe the license number which was reported by his wife to the police along with a description of the automobile. However, Mr. Rowe was unable to identify the individuals involved in the offense (Tr. 27-29, 36).

Mr. James Keene, a partner in Excelsweld Company, testified that he was awakened by a call from the police "a few minutes after 4 a.m." on August 21, 1965, and that when he subsequently inspected his office an hour later, he discovered that a bookkeeping machine, an adding machine, an electric typewriter and a plastic money tray containing ten to twelve dollars in change were missing (Tr. 15-16, 22-24). He testified as to the value of the typewriter and bookkeeping machines when they were purchased; there was no testimony as to their value at the time of the housebreaking (Tr. 17-18, 56).

Officer Hill testified that while he and Officer Bowie were responding to a call concerning the housebreaking at the Excelsweld Company he noticed a car similar to Appellant's making a right turn from 12th Street and proceeding east on "F" Street (Tr. 40-41, 49-50). When a few minutes later the police dispatcher broadcast the description and license number of a vehicle which had been reported at the scene of the crime, the officers made a search in the vicinity where Officer Hill had previously seen the vehicle, stopped Appellant and Williams at 14th and Constitution, arrested them and searched Appellant's automobile. In the trunk of Appellant's car were an electric typewriter and a bookkeeping machine which Mr. Keene later identified as his property (Tr. 46-47). The adding machine was not recovered; and there was no testimony as to the whereabouts of the missing money.

With the foregoing evidence, the government rested (Tr. 55).

At this point Appellant's counsel approached the bench. He made a motion for acquittal, which was denied (Tr. 56, 59); but he also informed the court of an unusual situation which had just arisen. He stated that, prior to the trial, Mr. Williams had unexpectedly appeared in court and volunteered to testify in Appellant's behalf. He advised the court that the gist of Williams' offered testimony was that he had borrowed Appellant's car, had participated in the larceny with another person, had then driven back to Appellant's home at 515 - 13th Street, N.E., and that Appellant was driving him home when they were both arrested (Tr. 58-59).

Williams, who had been indicted with Appellant for the crimes, had pleaded guilty to the larceny count in the indictment on March 11, 1965, and at the time of Appellant's trial was awaiting sentence; because he had not been sentenced, the housebreaking charge against him had not yet been dismissed. In order to be scrupulously fair to Williams, Appellant's counsel suggested that Williams' attorney be called to advise him of possible self-incrimination should he take the stand. The court and the government concurred; the jury was removed and Williams' attorney summoned (Tr. 57-61).

Williams' attorney, David Applestein, indicated that since the government had stated it could still prosecute Williams for housebreaking, he would recommend that his client not testify (Tr. 62). After conferring with Mr. Williams, Mr. Applestein announced that Williams had changed his mind when informed of the possibility of self-incrimination under the pending housebreaking charge and now declined to testify on Appellant's behalf (Tr. 63-65). Thus surprised, and faced with the loss of a vital witness, Appellant's counsel moved the court to declare a mistrial and continue the case until Williams could freely testify (Tr. 63-67). The court, however, denied the motion on the ground that the government had already presented its witnesses and the case had been delayed long enough (Tr. 67-69).

Appellant's counsel then began his defense by calling two witnesses, Miss Thelma Young (Appellant's sister) and Mr. John Ford, a friend of Appellant's, both of whom placed Appellant at home, asleep, until 3:20 or 3:30 a.m. on August 21, 1965 (Tr. 72, 74-76). He then proposed to

put Appellant on the stand to explain his presence with Williams at 4:15 a.m. (about which Williams was originally to have testified). Appellant had previously been sentenced under the Federal Youth Correction Act for assault with intent to commit carnal knowledge,* and counsel requested the court to rule that under Luck v. United States, 121 App. D.C. 151, 348 F.2d 763 (1965), the government not be permitted to bring that prior conviction before the jury on cross-examination. The trial judge denied the request (Tr. 77-80).

After consulting with Appellant, counsel nonetheless decided to place him on the stand. Taking the stand in his own defense, Appellant testified that he and Williams had come from visiting Miss Gloria Murphy (Appellant's girl friend, who was ill) at about 1:30 a.m. on August 21, 1965; that Appellant had then loaned Williams his car and had gone to bed; that he was awakened by a call from Miss Murphy a little later on, subsequently went back to sleep and was awakened by Williams who was returning his car at about 4:00 a.m.; and that Appellant was driving Williams home when he was stopped by the police (Tr. 83-85). Appellant said he was wearing bedroom slippers when arrested, and Officer Hill, when recalled, could not positively confirm or deny this (Tr. 99, 100). Appellant also testified that he had had no prior knowledge that stolen articles were in his automobile (Tr. 86-87, 90). On cross-examination, he admitted the previous conviction referred to above (Tr. 90-91).

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* Case No. Cr. 375-62

Miss Murphy was then called as a witness and testified that she had seen Appellant between 1:00 and 1:30 a.m. on the morning in question and had called him at home later that morning between 2:10 and 2:30 a.m. (Tr. 93-94). Appellant's mother, Mrs. Lela Young, was the final defense witness and confirmed the time of Miss Murphy's telephone call (Tr. 96-97).

After closing arguments by counsel, the court charged the jury (Tr. 126-43). The jury was twice instructed that it could infer Appellant's guilt on both the larceny and housebreaking counts merely from his presence as driver of the car in which the stolen goods were found (Tr. 137-38, 141-42). It was told that Appellant's prior conviction could be used to impeach his credibility (Tr. 128). The jury was further instructed that Appellant could be convicted as a principal if they found that he aided and abetted another in the commission of the offenses charged (Tr. 131-32). However, the court failed to inform the jury that one convicted of aiding and abetting must share the criminal knowledge and intent of the principal. Appellant's counsel objected to charge on the ground that "it ... militates against the defendant" (Tr. 142).

The jury, after deliberating over two hours, found Appellant guilty on both counts of the indictment. This appeal followed.

STATUTES AND RULE INVOLVED

Section 22-105 of the District of Columbia Code provides:

> "In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be."

Section 22-1801 of the District of Columbia Code provides, in pertinent part:

> "Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building ... with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years."

Section 22-2201 of the District of Columbia Code provides:

> "Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years."

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

1. The trial court erred in refusing to declare a mistrial or grant a continuance when such action deprived the defense of the highly exculpatory testimony of a key witness whose availability within a few weeks was certain.

2. The trial court erred in allowing the government to put before the jury, allegedly to impeach Appellant's credibility, the fact that he had had a previous conviction, while a juvenile, for the unrelated offense of assault with intent to commit carnal knowledge.

3. The trial court erred in failing to charge the jury that criminal intent is an essential element of the offense of aiding and abetting, and in twice instructing it that mere unexplained possession of stolen goods constitutes a sufficient basis for conviction of both larceny and housebreaking.

SUMMARY OF ARGUMENT

1. In the course of the trial below, and before presentation of the defendant's case, a witness appeared whose testimony, if believed by the jury, would have been of critical importance to the defendant. When it unexpectedly developed that this witness' testimony was temporarily foreclosed by virtue of a possibility that the government would useit to revive a charge against the witness which it had previously indicated would be dropped, defense counsel moved for a mistrial or continuance of the proceedings for a few weeks at the expiration of which the witness would no

longer be subject to possible self-incrimination. The trial court's denial of this motion, primarily on grounds that the government would be inconvenienced, was in the circumstances an abuse of discretion. The witness was clearly identified, Appellant had done everything possible to obtain his testimony, and it was apparent that the evidence he would give would be of critical importance to the defense. These facts satisfied all of the requirements for a continuance set out by this court in Neufield v. United States, 73 App. D.C. 174, 118 F. 2d 375 (1941), cert. den., Ruben v. United States, 315 U.S. 798 (1942). The trial court's ruling, depriving the defense of what would have been its key witness, was all the more prejudicial in view of the very weak evidence relied upon by the government.

2. In Luck v. United States, 121 App. D.C. 151, 348 F. 2d 763 (1965), this Court adumbrated the criteria to be applied when government cross-examination for impeachment relies on defendant's prior conviction, while a juvenile, of another serious offense. One of these criteria is the relationship between the prior offense and the present indictment. In this case, Appellant's prior conviction for assault with intent to commit carnal knowledge was completely unrelated to his credibility in a case involving housebreaking and larceny, and could only have served to prejudice the jury. The Luck case also stressed the importance of the defendant's right to give his own version of the facts to the jury. This objective was not served here by putting Appellant to the harsh choice of either divulging a prejudicial

prior offense or foregoing entirely his proof on the key issue in the case -- especially where, in view of the court's disposition of the motion for continuance, he was the only person who could explain his presence at the scene of the arrest and thus rebut the presumption on which the government's case rested.

3. The trial judge charged that the jury could find Appellant guilty if it found he had aided and abetted the commission of a crime. However, the jury was at no point instructed that two of the elements of the offense of aiding and abetting are knowledge that a crime has been committed and action in conscious furtherance thereof. Without such instruction, the jury could have convicted Appellant even if they believed his testimony that he was merely driving Williams home after Williams had borrowed his car earlier in the morning. Although no objection was raised to this aspect of the charge, this omission constituted plain error affecting Appellant's substantial rights which can and should be noticed under Rule 52(b) of the Federal Rules of Criminal Procedure, especially in view of the thinness of the government's case. Moreover, the charge as a whole, by emphasizing the presumption of guilt which was the sum of the government's case and by treating cursorily Appellant's rebuttal testimony, unfairly militated against Appellant.

ARGUMENT

I. It Was an Abuse of Discretion for the Trial Court to Deny Appellant's Motion for Mistrial, or, in the Alternative, to Refuse to Continue the Case Until Appellant's Key Witness Could Testify. *

As indicated in the Statement of the Case, a highly unusual situation developed during the course of the trial in this case. Specifically, evidence which, if credited by the jury, would have exonerated Appellant, became temporarily unavailable because of the fortuitous circumstance that, although the witness had previously pleaded guilty to the very offense of which Appellant stood charged, he had not yet been sentenced and there was still outstanding against him a second charge which the government had indicated would be dropped. In these circumstances, Appellant's motion for a mistrial or continuance until such time as the witness could testify "without the fear of further prosecution" (Tr. 67) should have been granted, and it was an abuse of the trial judge's discretion to reject the motion on the grounds she cited.

The propriety of the exercise of discretion by the trial court here under review must be judged in light of the standards for granting mistrials, continuances and adjournments in similar cases set forth by this Court in Neufield v. United States, 73 App. D.C. 174, 118 F.2d 375 (1941), cert. den., 315 U.S. 798 (1942). Here the trial court had before it the following factual showing in support of the requested continuance:

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* With respect to Argument I, Appellant desires the court to read the following pages of the reporter's transcript: 28-29, 33-34, 37-38, 40-50, and 57-69, inclusive.

First, who the witness was and what the nature of his testimony would be. Appellant's counsel identified Williams, and on two separate occasions outlined to the trial judge the gist of what his evidence would be were he free to testify (Tr. 58-59).

Second, that the testimony was competent and highly relevant, even critical, to Appellant's defense. It has been held in many jurisdictions that it is an abuse of discretion to refuse to allow a defendant in a criminal case to gather witnesses to establish his whereabouts at the time of the crime. See State v. Smith, 66 N.J. Super. 465, 169 A. 2d 482 (1961), aff'd, 36 N.J. 307, 177 A. 2d 561 (1962); Wilcher v. Commonwealth, 297 Ky. 36, 178 S.W. 2d 949 (1944); Annot. 41 A.L.R. 1530 (1926). Williams' proferred testimony would not merely have corroborated Appellant's evidence on this score, which constituted only part of his defense, but would also have exonerated Appellant altogether from responsibility for the offenses of which he stood indicted. In United States v. White, 324 F. 2d 814 (2d Cir. 1963), the court (per Moore, J.) held that the failure to grant an adjournment of the trial until a material witness' testimony could be presented was reversible error. There, as here, "there was no other way for appellant to substantiate his defense." Id. at 816.

Third, that the witness would be available at a specific time in the near future. Appellant's trial was held at the end of March, 1966. Williams had pleaded guilty some three weeks earlier. The records of the

District Court show that he was actually sentenced, only six weeks after Appellant's trial, on May 13, 1966, at which time the second count in his indictment was routinely dismissed on the government's motion (Case No. Cr. 1019-65).

Finally, that Appellant had exercised due diligence to obtain the witness' testimony and was genuinely surprised and put at a great disadvantage when it became temporarily unavailable. Williams' offer to testify came at the very eve of trial, and he was present in court when Appellant's counsel suggested the propriety of his discussing his testimony with his counsel, even though Williams himself initially did not desire his counsel to be present (Tr. 58-59). The record is clear that, after conferring with counsel, Williams changed his mind about testifying for fear that he might incriminate himself on the still pending housebreaking count (Tr. 62-65), and there is no question that Williams had a right to so refuse to testify. Under these circumstances, there was nothing more that Appellant could have done to obtain his testimony.

There is also no doubt that Appellant was seriously prejudiced by the unexpected turn of events. In view of Williams' invocation of the privilege and because no one else could explain Appellant's presence with Williams at the time of his arrest, his counsel was forced to place Appellant himself on the stand and permit the government on cross-examination to

expose to the jury Appellant's previous conviction.* Counsel himself stated that his "strategy was changed."

Appellant thus satisfied all the basic requirements for a mistrial or continuance of his case set forth by this Court in Neufield. The trial court knew who the witness was and what his testimony would be; that the proffered evidence was not only competent and relevant, but critical to the defense; that the witness would be available at a specific time in the near future; and that Appellant had exercised every diligence in attempting to get the witness to testify. Moreover, as in White, supra, a continuance or "adjournment would not have been an unduly burdensome hiatus in the trial, since the witnesses were few and the factual issues clearly defined." 324 F. 2d at 816.

In cases similar to the one at bar, where it has been held no abuse of discretion to refuse a continuance to obtain a missing witness, one or more of the foregoing prerequisite factual showings has been absent. For example, in Woods v. United States, 26 F. 2d 63 (8th Cir. 1928), Appellant requested a continuance to obtain the testimony of one Sutton, with whom he had jointly been indicted, claiming it would exonerate him. However, on the facts of that case the court concluded:

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* Since the trial court's refusal to keep this prejudicial information from the jury itself was error (see II, below), the original error was compounded.

> "While it is doubtless true that, if Lee Sutton had been present, and if he had testified as stated in the motion, the defense would have been materially strengthened, yet there could be no reasonable certainty that Sutton, even if present, would testify as stated, since such testimony would be a confession of his own guilt. Furthermore, there was no showing that the whereabouts of Sutton was known or that his presence could be procured at the next term of court or at all. There was merely the statement by defendant 'that the government will no doubt apprehend him and have him present at the next term of the court.' The motion was addressed to the sound judicial discretion of the trial court, and we think that under all the circumstances there was no error in denying the same." Id. at 64.

And in the Neufield case itself, appellant failed to make a preliminary showing of who the desired witnesses were, the relevancy of their testimony, or that there had been due diligence. In this case, all those factors, and more, are present.

Short of a mistrial, the trial judge should have continued the case, at least until it became clear when Williams' disability to testify would be removed. It is fundamental that the trial judge may, even on his own motion, grant a continuance if the ends of justice so require. Waite v. State, 169 Neb. 113, 98 N.W. 2d 688 (1959). The comments of the trial judge in this case show that she was aware that the underlying purpose of Appellant's motion was to obtain a postponement for the relatively brief period which would elapse before Williams' sentencing (Tr. 67-69). At the very least, the trial judge should have recessed the case in order to investigate with government counsel the possibility of accelerating the sentencing date. She

would also have been well within her authority in adjourning the trial to chambers in order to explore with all counsel, including the government, whether or not its theoretical right to press the second charge against Williams, despite its previous informal agreement to dismiss this court of the indictment, would in fact ever be exercised -- in other words, whether Williams' fears of possible further prosecution were not more fanciful than real as a practical matter.*

An additional and persuasive reason for a mistrial or continuance is found in the imbalance between the government's weak (and to some extent contradictory) evidence, on the one hand, and the immense tactical disadvantage to Appellant which flowed from the ruling depriving him of Williams' evidence. At the time the trial court heard Appellant's motion, it was aware:

First, that the government's case depended entirely on the inference of guilt which the jury might draw from the presence in Appellant's automobile of stolen property. Mr. Rowe had testified he could not identify the man he saw robbing the Excelsweld Company, and the government introduced no other evidence directly implicating Appellant in the offense.

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* While it is true that government counsel may have had no affirmative legal duty to grant Williams immunity (cf. Earl v. United States, _____ App. D.C. _____, 361 F. 2d 531 (1966)), government counsel in a criminal proceeding should be more than a mere advocate of a position, and should not affirmatively (albeit indirectly) take any action which would have the effect of preventing pertinent evidence from coming before the jury.

Second, the witness Rowe was also quite uncertain when he saw the robbery taking place. He admitted it could have been much earlier than 4:00 a.m.

Third, two of the missing items, the adding machine and the money, were never recovered, suggesting intermediate transactions inconsistent with the "recent unexplained possession" presumption.

Fourth, Rowe testified the stolen articles were placed in the back seat of the vehicle, but the only items actually recovered were found by the police in the trunk of Appellant's car.

Fifth, the testimony of Officer Hill placed Appellant's car, prior to the radio dispatch call, heading east on "F" Street, N.E., in the general vicinity of his home.

Finally, Williams' proposed testimony indicated the involvement of a third person (which could account for the missing items, for example) and that he drove back to Appellant's home (which could account for the presence of a car like Appellant's heading east on "F" Street at about 4:00 a.m.).

In unusual circumstances such as the foregoing, with the government's case hanging by an inference, and the vital nature of Williams' testimony, which would shortly be available, known to the court, it was incumbent upon the trial judge to take some action, either by mistrial,

continuance, or adjournment, so that "the end of the public justice would [not] be defeated". United States v. Perez, 9 Wheat. (22 U.S.) 579 (1824). There was ample authority for such remedial action, since the Supreme Court has indicated that one ground for the granting of a mistrial might be the absence of important witnesses, even for the prosecution. Wade v. Hunter, 336 U.S. 684, 691 (1949); Downum v. United States, 372 U.S. 734, 737 (1963). Cf. Brock v. North Carolina, 344 U.S. 424, 427-28 (1953), where the Supreme Court held no violation of due process a state court mistrial granted to the prosecution where two state witnesses refused to testify under the Fifth Amendment.

II. The Trial Court Erred in Requiring Appellant to Divulge Before the Jury on Cross-Examination a Prejudicial Prior Conviction When the Offense Was Unrelated to the Present Charge and Occurred While Appellant Was a Juvenile. *

This Court has recently promulgated guidelines for trial courts in situations, such as the case at bar, where a juvenile has been waived out of Juvenile Court and into District Court, and on a subsequent offense, his prior conviction while a juvenile is placed before the jury for impeachment purposes. Luck v. United States, 121 App. D.C. 151, 348 F. 2d 763 (1965). Appellant contends that under these guidelines, his carnal knowledge conviction should have been kept from the jury.

* With respect to Argument II, Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 77-80, inclusive.

Luck emphasized that one of the relevant factors to consider is the nature of the prior crime. There, the prior offense (grand larceny) was closely connected to the offense being tried (housebreaking and larceny). Even though the offenses in Luck were connected, this Court indicated that, on remand on another issue, if the trial judge should decide to keep Luck's prior conviction from the jury, it would not be error. Id. at 157, 348 F. 2d at 769. In Appellant's case, his prior conviction for assault with intent to commit carnal knowledge was in no way related to the offenses charged in the indictment. In fact, this prior offense was just the type of evidence "to generate heat instead of diffusing light . . ." and "where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." State v. Goebel, 36 Wash. 2d 367, 379, 218 P. 2d 300, 306 (1950). It was thus peculiarly of that class which should be excluded on cross-examination for credibility.

The Luck case also stressed that it is often more important "for the jury to hear the defendant's story than to know of a prior conviction." Luck v. United States, supra at 157, 348 F. 2d at 769. Early in the trial below, it became evident that the crucial issue in the case, and the main problem facing Appellant, was an explanation for his possession in the early hours of the morning of stolen items in the trunk of his automobile. Indeed, the trial judge so charged the jury (Tr. 138). Appellant's initial trial strategy was to place Williams on the stand in explanation. When the court,

in what Appellant submits was an abuse of discretion, closed that method of defense to him, Appellant was forced to rely on his own testimony to overcome the inference of guilt established by the prosecution.

This second line of defense was obviously disadvantageous, for it exposed Appellant to inquiry into his criminal record, were he to rebut at all the presumption attendant on his "possession" of the stolen articles. In the exercise of that sound discretion required under Luck, which takes account of all of the circumstances of the case at the time, the trial judge, having entered a ruling which in effect deprived Appellant of his principal witness, should not have then burdened him with the choice of keeping silent completely or taking the stand and exposing an inflammatory past conviction of scant or no relevance to the offenses charged in this case.

If Appellant had declined to testify for fear that his past conviction would outweigh any probative force his testimony might have, the trial judge could properly have been held to have abused her discretion. Id. at 157, 348 F. 2d at 769. The fact that Appellant ultimately decided to take his chances on testifying, despite the risks involved in that course of action, does not, in view of the limited options open to him as a result of the court's prior ruling, obviate the error, but rather highlights the unfairness which inhered in the combined effect of the court's rulings.

Appellant respectfully submits that, in light of the facts of this case, the trial court erroneously permitted his prior conviction to be placed before the jury, and that this extremely prejudicial testimony

(particularly in view of the government's weak and inconsistent case discussed above) entitles him to reversal of his conviction.

III. The Trial Court Erred (1) in Neglecting to Instruct the Jury That One Who Is Convicted of Aiding and Abetting Must Have Willfully Participated in the Offenses Charged, Thus Permitting the Jury to Find Appellant Guilty Even If They Believed His Testimony, and (2) in Unduly Emphasizing the Government's Case in the Charge as a Whole. *

The trial judge began her charge by outlining the general role of the jury and its right to take into consideration demeanor evidence and possible bias of witnesses in evaluating testimony (Tr. 126-128). The jury was also instructed on such matters as the presumption of innocence, burden of proof, reasonable doubt, and what is meant by direct and circumstantial evidence (Tr. 129-131, 136-37).

The court then discussed the substantive offenses for which Appellant was indicted. She instructed that Appellant's prior conviction could be used by the jury to impeach his credibility (Tr. 128), charged (and then repeated, over Appellant's objection) that Appellant could be found guilty on both counts of the indictment merely by the unexplained possession in his automobile of stolen articles (Tr. 137-138, 140-142), and outlined the elements in the specific counts charged in the indictment (Tr. 132-35).

The trial court also charged, at the request of the government (Tr. 104) that, in accordance with §22-105, D.C. Code, Appellant could be found guilty of both offenses in the indictment if the jury found he

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* With respect to Argument III, Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 126-143, inclusive.

had aided or abetted in the commission of those offenses. However, in contrast to her subsequent instructions on the specific offenses actually charged in the indictment, the court did not outline the elements of the offense of aiding and abetting. Instead, she merely advised the jury that

> "If two people together commit an offense and they join in committing an offense, then each is responsible just as though he did all of the physical acts involved in the criminal undertaking. In other words, if one person aids or abets, that is, assists or helps another person in the commission of a crime, the person so aiding or abetting is guilty of the completed offense as though he had, himself, committed it entirely." (Tr. 131-132).

And further,

> "Under this aiding and abetting law about which I spoke to you, a person commits a criminal offense if he, himself, does the things that constitute the criminal act, or if he aids or abets another to do so." (Tr. 134).

* * *

One of the essential elements of aiding and abetting is criminal intent on the part of the accused:

> "Generally speaking, to find one guilty as a principal on the ground that he was an aider and abettor, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed." Johnson v. United States, 195 F. 2d 673, 675 (8th Cir. 1952).

Thus, in Kemp v. United States, 114 App. D.C. 88, 311 F. 2d 774 (1962), this court held that the evidence did not justify conviction of the accused as an aider and abettor because there was no credible evidence of guilty knowledge on his part. See also Mathes & Devitt, Federal Jury Practice and Instructions -- Civil and Criminal, §8.07 (1965).

It has been long held in this jurisdiction that it is reversible error, which may be noticed by this court on its own motion, for the trial court to fail to explain to the jury the elements of every offense of which the accused might be found guilty. Thus, in Williams v. United States, 76 App. D.C. 299, 131 F. 2d 21 (1942), the accused Appellant had been indicted for two counts of assault and one of rape. All of Appellant's claims of error were rejected by this Court. However, the conviction was nonetheless reversed for plain error in the failure to charge on the elements of the stated, and related, offenses. The Court said:

> "We have always been proud that under our law the elements which go to make up a crime are definitely established. To insist that a jury be told what [the offense] is, and, when circumstances require, what the included offenses are, in the eyes of the law, is not to demand meaningless ritual." Id. at 300, 131 F. 2d at 22.

Similarly, in the recent case of Byrd v. United States, 119 App. D.C. 360, 342 F. 2d 939 (1965), this Court reversed a conviction for robbery where the trial court failed to charge the jury on every element of the offense. The Court observed:

> "It was fundamental error to send the case to the jury without instructions as to the elements of the offense which the Government must prove beyond a reasonable doubt before a verdict of guilty can be returned." Id. at 362, 342 F. 2d 941.

The court's failure to instruct the jury on the elements of aiding and abetting was particularly unfortunate in the context of this case. First, as has been noted above, this was a case where the government's evidence of guilt was inferential, and, suffice it to say, less than overwhelming.

In such instances, the "closeness of the issue against [Appellant] imposed an obligation on the trial judge to instruct the jury with extreme precision . . ." United States v. Garguilo, 310 F. 2d 249, 254 (2nd Cir. 1962).

More importantly, part of Appellant's testimony in his own defense consisted of an admission that he was in fact transporting merchandise later determined to have been stolen although he was unaware it was in his automobile and had no knowledge of the housebreaking (Tr. 85-87). All the jury had been told was that it was an offense to assist "or help another person in the commission of a crime" (Tr. 131). They were not instructed that the accused must know that a crime has been or is being committed and must seek by his actions to implement the offense. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); United States v. Peoni, 100 F. 2d 401, 402 (2nd Cir. 1938) (per L. Hand, J.). With uncontroverted proof that the items found in Appellant's vehicle were stolen property, the jury could have believed Appellant's testimony but nevertheless viewed his actions, however innocent, as assistance and hence criminal under the law as the court had set it forth in the charge. Clearly, the error here was fundamental and the danger great that the jury believed that they had no choice but to convict. Reversal is required on this ground alone. F.R.Crim. P. 52(b).

The trial court's charge in its entirety also unfairly militated against the Appellant, and counsel below objected on that ground (Tr. 142). First, the charge, taken as a whole, instructed the jury almost entirely on the government's theory of the case, and almost nothing was said concerning

Appellant's defense, certainly not of its specifics. Out of a total charge comprising seventeen pages of the transcript, less than one-third of one page, near the end of the charge, was devoted to Appellant's theory of the case (Tr. 138-139).

Further, over Appellant's objection, the court re-emphasized to the jury that he could be guilty of housebreaking as well as larceny by the mere unexplained possession of recently stolen property (Tr. 141-142). As the court had already charged the jury that possession of stolen property went to both counts of the indictment (Tr. 138), the additional charge was unnecessary and only accentuated the government's case to the defendant's prejudice.

In Rivera v. United States, ____ App. D.C. ____, 361 F. 2d 553 (1966), Chief Judge Bazelon, although dissenting, noted that

> " . . . courts have long recognized the dangers of inferring guilt solely from possession of stolen goods and the need to instruct the jury carefully and fully, tailoring the charge to the facts of the case." Id. at _____, 361 F. 2d at 556.

In Rivera, Appellant, prosecuted for housebreaking and larceny, complained that the trial court's instructions did not adequately present his theory of the case. The majority held that because of Appellant's failure to articulate desired instructions, the overwhelming evidence of his guilt, and the correctness of the instructions as given, there was no error. In this case, on the other hand, exactly the reverse is true: counsel objected to the charge as given; evidence of guilt was weak and inferential;

and the trial court's instructions on a crucial facet of the case (aiding and abetting) were plainly inadequate.

Appellant submits that the trial court's charge in this case was neither careful nor complete, and that the errors recited above entitle him to a reversal of his conviction.

CONCLUSION

For the foregoing reasons, the verdict and judgment of the court below should be reversed.

Respectfully submitted,

Aloysius B. McCabe
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Attorney for Appellant
(Appointed by this Court)

November 10, 1966

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused to be deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing brief this 10th day of November, 1966, addressed to Frank Q. Nebeker, Esquire, United States Attorney for the District of Columbia, Room 3834D, United States Courthouse, Washington, D. C. 20001.

Aloysius B. McCabe

REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20,269

JOSEPH YOUNG, JR.

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 27 1966

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December 27, 1966

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TABLE OF AUTHORITIES

* Cases chiefly relied upon are marked by asterisks.

IN THE
UNITED STATES COURT OF APPEALS
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No. 20,269

JOSEPH YOUNG, JR.

Appellant

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UNITED STATES OF AMERICA

Appellee

REPLY BRIEF FOR APPELLANT

I. Williams' Testimony Was Both Reasonably Available and Material, and It Was Prejudicial Error to Deny Appellant's Requested Continuance to Obtain It.

The government's justification for the trial court's failure to grant Appellant a mistrial or continuance until Williams could testify rests upon two arguments. First, it is said, there was no assurance Williams would be available. Next, it is postulated, Williams' evidence would not have been material because (1) he was a recently obtained witness and (2) his testimony would have been cumulative.

In support of its first argument, the government theorizes that Williams could have dropped his guilty plea on the larceny count and demanded a jury trial, or that the government could have resurrected the housebreaking count it had previously agreed to dismiss, even at some indefinite time in the future (Gov't. Br., pp. 5-9). However, such remote possibilities must give way to the realistic probabilities which confronted the trial court on this record. Appellant need not prove the witness will certainly appear; only that his testimony "can probably be obtained if the continuance is granted". Neufield v. United States, 73 App. D.C. 174, 179, 118 F. 2d 375, 380 (1941), cert. denied, Ruben v. United States, 315 U.S. 798 (1942).

There is nothing in the record to suggest that Williams was contemplating any change in his plea of guilty. In fact, the record amply supports Appellant's contention that Williams' sole concern was with the second count of the indictment (Tr. 62-64). And, on this point, subsequent events have borne the probabilities out. Williams did not withdraw his guilty plea, and has now been sentenced on that count of the indictment (Case No. Cr. 1019-65).*

Nor is there any evidence that the government was seriously considering reindicting Williams for housebreaking either before or after

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* Undersigned counsel has recently received an affidavit from Mr. Williams confirming the reason for his invocation of the self-incrimination privilege and his present willingness to testify for Appellant in the event that this Court orders a new trial. This affidavit is not part of the record on this appeal. However, a motion for leave to lodge it with the Court is being filed simultaneously herewith.

his plea of guilty to larceny had been accepted by the court. The parties recognized that once Williams was sentenced, the housebreaking count would be dismissed, not to be revived. Counsel for Appellant mentioned it (Tr. 66); the trial court referred to it (Tr. 66-67); and in fact, it happened (App. Br., pp. 13-14). The government's attempt to suggest that this pro forma sequence of events was not predictable is unconvincing. See United States v. Doyle, 348 F. 2d 715, 718 (2nd Cir.), cert. denied, 382 U.S. 843 (1965); cf. United States v. Doe, 101 F. Supp. 609 (D. Conn. 1951).

Moreover, the government's prior decision to move for dismissal of the housebreaking count against Williams would not have been affected by anything that Williams was likely to admit in his testimony for Appellant. The offer of proof by Appellant (Tr. 58-59) contained only Williams' admission of larceny, to which he had already pled guilty. The government was not, as its brief appears to imply (Gov't. Br., pp. 7-8), holding Williams' housebreaking charge in abeyance in the hope of getting more evidence; it was merely awaiting his sentencing to obtain the court's approval to dismiss the remaining count of the indictment. Fed. R. Crim. P. 48(a); United States v. Doe, supra.*

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* Even if the government were to attempt to revive a plea dismissed, on its own motion, after sentencing, it is not at all clear such an unusual move would be permitted. While dismissal at the government's motion does not technically constitute an adjudication on the merits, United States v. Doyle, supra, at 721, at least one commentator has indicated that reneging by the government on a "plea bargain" should not be countenanced, 8 Moore's

(footnote cont'd. page 4 . . .)

In sum, the record does not lend support to the government's assertion (Gov't. Br., p. 5) that Williams' availability "was not apparent with any reasonable certainty". The government's attempt to distinguish this case from United States v. White, 324 F. 2d 814 (2nd Cir. 1963) is therefore unsuccessful. In White, the missing witness was not merely "sick" (Gov't. Br., p. 10), but "had been beaten and was seriously ill" (Id. at 815). There was no evidence he would be definitely available by any set date, but merely a showing that he would probably be able to appear in "a couple of weeks". (Ibid.) There is no reason why a probable delay of a couple of weeks should stand on a different footing from one lasting six weeks.

The government's second argument that Williams' testimony was, in any event, immaterial to Appellant's defense (Gov't. Br., p. 9-11) is patently unsound. In the first place, the government's suggestion that Williams' late and unexpected appearance for Appellant made his testimony any the less vital is an obvious non sequitur. The record amply demonstrates the critical nature of Williams' proposed testimony. The deprivation of that testimony forced Appellant's counsel to "change his strategy" (Tr. 81) by placing Appellant himself on the stand. To argue in the face of this that

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* (cont'd. from previous page . . .)
Federal Practice, ¶11.05[4] (2nd ed. 1966), and there is ample precedent condemning such action, as pointed out in the government's discussion of judicial enforcement of agreements to testify for the government. (See Gov't. Br., pp. 7-9) Indeed, permission to dismiss counts under Fed. R. Crim. P. 48(a) is conditioned on assurance by the government that its purpose is not to harass the defendant at some later date with the same charges. See United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n., 228 F. Supp. 483 (S.D. N.Y. 1964).

"appellant in no way intended to rely on Williams' testimony" (Gov't. Br., p. 9) misstates the record.

The government is also in error in attempting to categorize Williams' testimony as merely "cumulative". The short answer to this contention is that since Williams was the first witness to be called by Appellant, there was no other defense evidence in the case to which Williams' proposed testimony could be cumulative, and hence this clearly was not the ground on which it was excluded.*

Further, Williams' profferred testimony would not have duplicated that of the other defense witnesses. As pointed out in Appellant's opening brief (pp. 13-15), Williams was the only person who could testify from personal knowledge that Appellant was not at the scene of the crime at the critical hour of 4 a.m. This crucial fact was recognized by the prosecutor, whose summation repeatedly hammered home to the jury that none of the witnesses who did testify for the defense could place Appellant at home after 3:30 a.m. on the morning when the offenses occurred (Tr. 112-113).

The reason for the rule allowing a trial court to limit witnesses is to prevent duplicative testimony on issues as to which there already exists sufficient evidence for a court or jury. 6 Wigmore, Evidence,

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* Cumulative evidence is "additional evidence to support the same point, and of the same character as the evidence already produced". State v. Mucci, 25 N.J. 423, 433, 136 A. 2d 761, 766 (1957) (emphasis added). It is true, of course, that Appellant subsequently testified in his own behalf. But to hold after the fact, as the government urges, that Appellant thereby rendered the excluded witness' testimony "cumulative" is to distort the rule against cumulative evidence past all recognition.

§1907-1908 (3rd ed. 1940). The rule was never intended to stifle testimony on the crucial issue in the case (i.e., where was the defendant when the crime was being committed), especially where there are no other witnesses, except the defendant himself, who can testify to the facts. See People v. Bryan, 190 Cal. App. 2d 781, 12 Cal. Rptr. 361 (1961) (abuse of discretion to exclude corroborating testimony vital to defense). Moreover, a defendant's Fifth Amendment rights include the right to refuse to take the stand. United States v. Echeles, 352 F. 2d 892, 897 (7th Cir. 1965). That right would be nugatory indeed if trial courts could exclude, in advance, a material witness' testimony on the ground that it would be merely "cumulative" of what the accused could testify to himself, thus forcing the defendant, in effect, to relinquish either his constitutional right or a vital element of his defense.

It is also important that Williams would not merely have testified that Appellant was not at the scene of the crime; he was prepared to admit that he committed the larceny.* The distinction between a mere "alibi" witness and one who confesses to the offense is well recognized. In Brummett v. Commonwealth, 263 Ky. 460, 92 S.W. 2d 787 (1936), the defendant, on trial for housebreaking, had been denied a continuance to produce a witness he claimed would admit to the offense. The court stated:

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* "MR. GARBER: I expect he [Williams] would confess to this crime, there is no question in my mind. He denies the housebreaking. He tells me a young man, who he believes is now at the Youth Center, stopped him on the street and he had in his possession what appeared to be a small type of machine and bag of change, and his story is there were some other machines parked sitting outside of this place that were too heavy for him to carry and that Williams went there --" (Tr. 59).

> "The commonwealth takes the position that, as several witnesses testified that appellant was elsewhere than at the scene of the crime, the evidence of Crabtree was merely cumulative, and the refusal of the continuance was not prejudicial. There is a difference between evidence to the effect that the accused was with certain parties at various times on the night of the crime and the evidence of the man who actually committed the crime that the accused was not a participant in the crime. One may be mistaken as to the facts constituting an alibi, but he who commits a crime like the one in question cannot be mistaken as to who were present and participated in the crime, even though his criminal record may cast doubt on his veracity. In the circumstances, we think it was an abuse of discretion not to grant the continuance. . . ." Id. at 461-62, 92 S.W. 2d at 788.

Finally, it is clear that the trial court did not deny Appellant's motion for continuance because she thought Williams would not be readily available, or that his testimony would have been cumulative. She denied relief primarily because she believed the government might be inconvenienced. (Tr. 68-69). The question is whether, in the unusual circumstances obtaining at the time, such inconvenience (if any*) should have taken precedence over Appellant's right to have a complete trial record without being forced to testify in his own behalf.

II. It Was Reversible Error to Allow Appellant's Previous Conviction into Evidence to Impeach His Credibility

The government has produced an anthology of recent opinions in this circuit (Gov't. Br., pp. 13-21) which forcefully demonstrates this Court's growing uneasiness over the effect of the rule of evidence applied against Appellant in this case. Specifically, Appellant, as the price of

* Appellee points out (Gov't. Br., pp. 6-7) that its evidence "consume[d] 53 pages of the transcript and took several hours of court time to present." The fact remains, however, that here as in White, supra, at 816, its "witnesses were few and the factual issues clearly defined."

taking the stand in his own defense, was forced to reveal a juvenile conviction of inflammatory nature (carnal knowledge) which had scant relevance to the issue of his credibility and could serve only to have prejudiced his case in the eyes of the jury.*

The Court's disquietude is not without reason. The evidentiary rule which permits admission of past, unrelated and serious offenses to impeach a defendant's credibility has neither logic nor history to support it. Note, Procedural Protections of the Criminal Defendant, 78 Harv. L. Rev. 426, 441 (1964); Brown v. United States, No. 20,041, D.C. Cir., November 10, 1966, p. 6 (slip opinion). Recent studies indicate that juries have "failed to segregate evidence of a prior record introduced for impeachment purposes and used it instead as an indication that the defendant 'was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial'." Note, 78 Harv.L. Rev., supra, at 441. It is no wonder, in view of the increasing recognition of the dangers inherent in the indiscriminate acceptance of such evidence, that more restrictive rules have been adopted in the Uniform Rules of Evidence and the American Law Institute Model Code, as well as in England (Gov't. Br., pp. 15-18). And in Luck v. United States, 121 App. D.C. 151, 348 F. 2d 763 (1965), this Court held that perfunctory admission of past, unrelated and serious offenses for impeachment purposes is no longer permissible and that the matter is, instead, one for the informed exercise of the trial court's discretion.

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* The petit jury which repeatedly was invited to consider the effect of appellant's conviction for assault to commit carnal knowledge contained six women (Tr. 11).

If this Court were now to decide, as Appellant submits it should, that only past offenses which clearly bear on credibility, such as those involving dishonesty or false statement, should be introduced, reversal would clearly be required in the present case. Such a decision would not, as the government contends (Gov't. Br., pp. 18-21), repudiate the will of Congress as expressed in D.C. Code Title 14 §305 (Supp. V 1966). There might be some force to this contention were this Court to exclude reference to past convictions altogether, but the adoption of an exclusionary rule that excepts past offenses which are indisputably relevant to credibility would merely involve an exercise in statutory interpretation, a function undoubtedly within the Court's general powers. Luck v. United States, supra.

Even if the Court is unwilling at this time to limit further the scope of the "prior conviction" rule, however, Appellant again urges that under the criteria established in Luck v. United States, supra, the trial court here committed reversible error. In the first place, the government's contention (Gov't. Br., pp. 12-14) that the trial court did in fact exercise the discretion required by Luck and Brown v. United States, supra, does not appear to be well taken. No reasons were given by the trial judge for denial of Appellant's motion to keep his carnal knowledge conviction from the jury (Tr. 80), and her comments in colloquy with counsel indicated less than total agreement with the rationale of those cases.*

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* "THE COURT: Oh, I remember the Luck case. They didn't do anything in that case, they just talked. . .

"You know, since Luck, everybody who comes in here who has a defendant who has been convicted, there is not one single one who thinks his conviction should come in." (Tr. 78, 80)

Even assuming the trial court did, as required, exercise its discretion, Appellant contends it was abused in this case.* Here was a situation where the past conviction had none of the virtues and all of the vices inherent in disclosure. Its relevance was minimal because the crime of assault to commit carnal knowledge was not even remotely pertinent to the issue of Appellant's credibility. See Brown v. United States, supra, at pp. 6-7. The potential for prejudice was high because of the unquestionably adverse emotional reaction the crime would generate in the minds of the jury. Indeed, the trial judge herself implicitly recognized the essentially inflammatory nature of the crime by suggesting at one point to counsel below that the offense be referred to "simply [as] assault" (Tr. 79). Thus, "this is a classic illustration of a case in which 'the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility.' " Brown v. United States, supra, at p. 7.

Finally, it must be recalled that Appellant was without the only witness who could testify that he was not present at the scene of the crime at the critical time of 4:00 a.m. The court was thus aware that to present any meaningful defense, Appellant would be forced to take the stand. By refusing to permit him to testify free from the stigmata of his past, the

* The government apparently contends that once this Court ascertains that discretion has been exercised by the trial court, its function is at an end (Gov't. Br., pp. 13-14). This is not the law. Brown v. United States, supra, at pp. 7-8, indicates that the results of the exercise are also reviewable.

court heightened the prejudicial effect of its prior ruling.* This factor, in addition to those considered above, made it incumbent upon the court to permit the accused to tell his story, unaccompanied by a recital of his prior misdeeds.

III. The Trial Court's Instructions as a Whole, and its Specific Charge on the Elements of Aiding and Abetting, Were Both Manifestly Inadequate

The government concedes that the trial judge did not specifically instruct the jury that criminal intent is an essential element of the crime of aiding and abetting (Gov't. Br., pp. 4, 21). Nevertheless, it urges that this omission does not constitute reversible error, essentially on the theory that jurors of normal intelligence would have deduced as much either from other parts of the court's charge or as a matter of "common sense" (Id., p. 22). On the facts at bar, this position is untenable.

The fact is that, in response to the prosecutor's specific request for a charge on aiding and abetting (Tr. 104), the court did little more than paraphrase for the jury the applicable statute (D.C. Code Title 22 §105). Contrary to Appellee's contention (Gov't. Br., pp. 21-22), this section of the Code is not self-explanatory in the sense that it either denotes or connotes that essential elements of the offense are knowledge and purposive participation. Cf. Moore v. United States, 356 F. 2d 39, 43 (5th Cir. 1966). And although

* The prosecutor skillfully capitalized on Appellant's dilemma in his summation to the jury. It was repeatedly called to the jury's attention that no one save the defendant had testified as to his whereabouts at 4:00 a.m. (Tr. 112-13, 123), while at the same time the jury was reminded of the fact that Appellant had been convicted of a serious offense and, hence, was not to be believed (Tr. 112-13).

it is true that the court's exposition of the elements of the crimes of housebreaking and larceny made reference to criminal intent, there was nothing in its discussion of these entirely separate statutes which lent itself to the process of extrapolation which the government contends must necessarily have taken place in the minds of the jurors (Gov't. Br., pp. 22-23). To argue that these limited references created a "context pregnant with meaning" (Gov't. Br., p. 22) for the jury's treatment of the aiding and abetting statute is to indulge in conjecture of the type appellate courts have consistently deemed unacceptable. See, e.g., United States v. Byrd, 352 F. 2d 570, 572 (2nd Cir. 1965).

The government also argues that it defies reason to suppose that a jury could convict a man who only innocently assists another in the commission of a crime (Gov't. Br., pp. 22-23). This argument founders on its own premise, for it assumes that this body of laymen somehow knew what kind of assistance was "innocent" and what "guilty" within the contemplation of the aiding and abetting law, despite an instruction which nowhere suggested that assistance to a criminal act could ever be non-culpable. It is well established that no such assumption is possible.*

Finally, careful, accurate instructions on the aiding and abetting statute were particularly necessary in this case because Appellant had

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* "The average man has some idea of what murder is, but we would not expect a judge to say, Jurors, you know what murder is, go and decide if this man is guilty of it . . . We merely insist that the judgment of a jury be informed and be made under safeguards of correct procedure." Williams v. United States, 74 App. D.C. 299, 300, 131 F. 2d 21, 22 (1942).

admitted aiding the co-indictee at least to the extent of lending him his car and, later on, driving him home. Despite his claim that he was unaware that the stolen articles were secreted in the car's trunk the jury could readily have believed, consistently with the court's instruction, that such assistance in and of itself sufficed to constitute Appellant an aider and abettor. Appellant's criminal intent vel non was therefore very much at issue, and the real possibility that the court's silence thereon prejudiced his substantial rights justifies invocation of this Court's power to notice and correct such plain error. Rule 52(b), Fed. R. Crim. P.

The charge taken as a whole, to which Appellant objected at his trial, also requires reversal of his conviction. At the conclusion of the court's instructions, the government requested that the jury be further told that they might infer from the possession of recently stolen property the guilt of the defendant on the housebreaking as well as on the larceny count (Tr. 140). Appellant's trial counsel stated that it was his impression that the "Court gave a very full and complete charge on that [point], though I don't like the instruction myself." (Ibid.). After the court recharged the jury as requested, counsel for Appellant formally objected on the ground that "[t]he charge as a whole actually militates against the defendant, that is basically my objection to the charge." (Tr. 142).

At this point government counsel interjected that the "jury considers the charge as a whole", whereupon the court cautioned the jury to

consider the charge in its entirety and not to single out some particular instruction and accentuate that (Tr. 142-43). However, the efficacy of this presumably curative instruction is open to question where, as here, it is specifically the charge as a whole that unduly stresses the government's case. The very fact that the court, at the government's behest, reiterated the legal consequences that arise from the possession of recently stolen property illustrates the inherent error. Indeed, it was this action which prompted counsel to enter his fundamental objection that the charge unfairly militated against his client. In these circumstances, Appellee's ipse dixit that "the charge was not only correct; it was fair and reasonable" (Gov't. Br., p. 25) is transparently unmeritorious.

CONCLUSION

For the foregoing reasons and those stated in Appellant's opening brief, the judgment below should be reversed.

Respectfully submitted,

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Attorney for Appellant
(Appointed by this Court)

December 27, 1966

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused to be deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing brief this 27th day of December, 1966, addressed to Frank Q. Nebeker, Esquire, United States Attorney for the District of Columbia, Room 3834D, United States Courthouse, Washington, D.C. 20001.

Aloysius B. McCabe

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,269

JOSEPH YOUNG, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit
FILED DEC 19 1966
Nathan J. Paulson
CLERK

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Assistant United States Attorneys.

Cr. No. 1019-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Did the trial court err in not declaring a mistrial or continuing the trial until an accomplice of the appellant, who had recently pled guilty to one of the two counts in the indictment, would not risk self-incrimination by testifying in support of appellant's story?

2) Was appellant's recent prior conviction for assault with intent to commit carnal knowledge admissible to impeach his credibility in his trial for housebreaking and larceny?

3) Is there a reasonable chance that, consistent with the court's charge here, because the court did not specify that an "aider and abettor" must have wilfully participated in the offense, the jury convicted appellant on a theory supporting his innocence?

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OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

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JOSEPH YOUNG, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was convicted by a jury on March 29th and 30th, 1966, of the offenses of housebreaking (D.C. Code § 22-1801) and larceny (D.C. Code § 22-2201). The jury also was charged on the aiding and abetting statute. (D.C. Code § 22-105).

Appellant was arrested at about 4:15 a.m. on August 21, 1965, as he was driving his car several blocks from the scene of the housebreaking and larceny involved in this case (Tr. 41), which had occurred just a few min-

the court. This Court's function under *Luck* is to ensure that judicial discretion is exercised; the result of a particular exercise of discretion will not be overturned on review. This is because only the trial judge can bring appropriate experiences to bear upon the facts of each case as they develop before him. Congress has long sanctioned the use, for impeachment, of prior convictions of any felony or misdemeanor, not including violations of municipal ordinances or offenses not triable by jury, under decisions of this Court explicitly holding that prior convictions similar to the one involved here may be so used. However, since a recent decision implied in dictum that some members of this Court were interested in tightening up this long-standing, Congressionally adopted construction of D.C. Code § 14-305, to dispel any possible confusion this Court should reaffirm its unwillingness and lack of power to do so.

Although the trial court did not explicitly instruct the jury that in order to convict appellant as an "aider and abettor" the prosecution must prove that he wilfully participated in the offense charged, this fact was unavoidably and patently clear from the instructions that were given. The jury was told that an aider and abettor "is just as responsible under the law as the person who commits a physical act which violates the law." (Tr. 131.) Judge Matthews repeatedly hammered home that both housebreaking and larceny are crimes of intent. It is absurd to suggest that a juror would, in these circumstances, convict appellant for possessing a degree of *mens rea*, innocent or merely "knowing", for which it would have clearly been impossible to convict the principal actor. Appellant's defense at trial was that he did not know of the stolen goods and had not participated in the crime. In the context of the facts of this case, it could only be whimsy to conclude that the jury convicted appellant on a theory of innocence. The overall charge was, moreover, totally correct and totally fair to appellant.

ARGUMENT

I. The trial court did not err in denying appellant's motion to declare a mistrial or continue the case until the testimony of a co-indictee might become available, because this was not apparent with any reasonable certainty.

(Tr. 58-60, 62, 65, 71-72, 80, 82-85, 86-87, 92-93, 96, 98)

Appellant contends that the trial court erred in refusing his motion for a mistrial or a continuance in order to procure the testimony of appellant's co-indictee, Thomas Williams, and asks this Court to reverse his conviction on that ground.[1] The circumstances are undisputed. The trial on March 29th began at 10:10 a.m. before Judge Matthews and a jury, and proceeded until about noon with the government's case, at the close of which appellant's counsel moved for a judgment of acquittal. During the colloquy, appellant's counsel stated that Williams had appeared in the courtroom, "much to my surprise," (Tr. 58-59, 60, 89) and that he was "going to call him." He "never thought that Williams would come down." (Tr. 58). He had "made no contact with him prior to this date as to what his testimony would be. This morning the defendant (sic) voluntarily came to the courthouse and spoke to me and told me what I expect his testimony would be * * *," (Tr. 65), that is, "that Young was not with him and that subsequently he went to Young's

[1] Counsel suggests the trial court should have recessed to investigate the possibility of accelerating the sentencing date. But, as Judge Matthews noted, sentencing is contingent on a probation report, and is not simply a docket problem. Also, counsel's suggestion that the court should have explored with the United States attorney the possibilities for immediately dismissing the charge raises an ethical problem about the role of trial courts in "plea bargaining". See Canons of Judicial Ethics 1, 15. At any rate, these suggestions were not presented to the trial court, which was thereby deprived of any opportunity to act upon them. See *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

house and Young was driving him home." (Tr. 58). In light of the self-incrimination problems, it was agreed that "he ought to have his attorney here," (Tr. 58), and the court recessed for lunch and in order to procure him. On reconvening, it appeared that Williams had been indicted on two counts, housebreaking and larceny, and that eighteen days earlier he had pled guilty to larceny and was then awaiting sentence. His counsel stated that "the government will drop [the housebreaking count] when he is sentenced on the larceny count, but as it now stands the count is still outstanding and the government indicates that they could prosecute him under that count." He therefore told his client to invoke the Fifth Amendment (Tr. 62), and Williams indicated that if called to the stand he would decline to testify. Appellant's counsel suggested that after sentencing and expiration of time for appeal on the larceny count, and after the government dropped the housebreaking count, Williams could no longer claim the privilege. Judge Matthews said she "guessed" they would drop the housebreaking count after sentencing, "[b]ut, of course, he only pled the other day, he only pled the 11th of March and I don't imagine any probation report would be ready for quite a little while. *Mr. Garber*: It might not be, it might be that he won't be sentenced until sometime in April." (Tr. 67). In denying appellant motion for a mistrial or continuance until Williams could no longer claim the privilege, Judge Matthews catalogued these reasons: the indictment was returned in September, 1965: appellant procured three continuances from November 12, 1965 to March 1, 1966: three more continuances were entered between March 1st and March 29th, Judge Matthews told appellant that "you had a good many continuances." "Now, the government has called all its witnesses down here and has put them on, so I am not going to continue it." (Tr. 68.)

Under the circumstances of this case one could hardly say that Judge Matthews abused her discretion in denying this continuance. Although the trial was not enor-

mously long, the government's proof was in when the motion was made, and this proof consumes 53 pages of the transcript and took several hours of court time to present. To have called a mistrial would have meant the waste of the morning's proceedings, and a continuance would have meant the risk of fading memories and dilution of the evidentiary impact. The mistrial technique is reserved for only compelling instances of need, and continuances, although more readily available, ordinarily should not be granted where, as here, the prospects of the evidence being available with reasonable assurance and within a reasonably short period of time are dim. See *Neufield* v. *United States*, 73 App. D.C. 174, 168 F.2d 375, 380 (1941), *cert. denied*, 315 U.S. 798 (1942); *Woods* v. *United States*, 26 F.2d 63, 64 (8th Cir. 1928). Williams had indicated he would not testify until the risk of prosecution was removed. Under this formula, at appellant's trial on March 29th there was no assurance that Williams would testify at any time in the near future. In fact, he was not sentenced until May 13, 1966, over six weeks after the issue was raised in this case. By this time the jurors' memories would have been blank slates. Williams could have withdrawn his plea on the larceny count any time before sentencing, (Rule 32(d), FED. R. CRIM. P.), and could have demanded a jury trial, thereby setting off his court date further into the dim future. There was, furthermore, no assurance that the prosecution would drop the housebreaking charge even if Williams were sentenced on the larceny count, or that this charge would not be reinstated, if not dismissed with prejudice, sometime before the applicable statute of limitations expired. *Cf. Earl* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 531 (1966). In cases where a defendant has testified against another upon the assurance of the prosecutor that some charge against him would be dropped, courts have indicated that they would indirectly enforce the assurance—to the extent of opening a prior guilty plea entered on the understanding the cause would be *nolled* after the defendant testified,

Machibroda v. *United States*, 368 U.S. 487 (1962); *People* v. *Bogolowski*, 317 Ill. 460, 148 N.E. 260 (1925), or by "continuing the cause until an application can be made for a pardon." *United States* v. *Lee*, 26 Fed. Cas. 910, 911, No. 15,588 (4 McLean 103) (Cir. Ct. Dist. of Ill. 1846 [2]). But courts are chary of enforcing immunity against prosecution even where an express "plea bargain" has been made, see *United States* v. *Lee*, *supra*; *Earl* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 531, 534 (1966), because of "the complexity and difficulty of evaluating the impact of that course." In a case where the defense sought the court to grant immunity from prosecution to a co-indictee witness, this Court recently concluded "that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power." *Earl*, *supra* at 534. The question of immunity from punishment under our system is "committed largely to the discretion of the states' attorney" or prosecutor, *People* v. *Bogolowski*, *supra* at 262.

Obviously, therefore, it was far from clear that Williams would not be subject to possible self-incrimination even after sentencing on the larceny count and dismissal of the housebreaking count. Williams himself had never indicated to the court that he would in fact testify in the manner indicated by appellant's counsel even if, upon sentencing, the housebreaking charge were dropped. And

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[2] In *Lee*, the court explained that: "An accomplice is used by the government because his evidence is necessary to a conviction. Being called as a witness, there is an implied obligation by the government, if not expressed, that if the witness shall make a full and honest disclosure of the facts, which have a direct bearing on the case, he shall not be prosecuted. * * * The government is bound in honor, under the circumstances, to carry out the understanding or arrangement, by which the witness testified, and admitted, in so doing, his own turpitude. Public policy and the great ends of justice require this of the court. If the district attorney shall fail to enter a nolle prosequi on the indictment against Lee, the court will continue the cause until an application can be made for a pardon." *Supra* at 911. This theory would not apply where, as here, it is the defense which seeks the witness' testimony.

the government's "promise," if any, to drop the second charge was obviously contingent upon a satisfactory sentence being imposed on the larceny plea. Otherwise there would have been no reason to delay decision until that sentencing. In these circumstances there was certainly no reasonable certitude that Williams would be available even after another long delay in this oft-delayed trial.

It is questionable, moreover, whether his testimony would have "materially strengthened" the defense. See *Woods* v. *United States, supra* at 64; *Neufield* v. *United States, supra* at 380; *Babb* v. *United States,* 210 F.2d 473 (5th Cir. 1954). It is clear from the record that appellant in no way intended to rely upon Williams' testimony in presenting his defense. Williams' appearance at trial either before or during the prosecution's case was utterly fortuitous and unexpected by appellant.[3] He had "made no contact with him prior to this date as to what his testimony would be." (Tr. 65). Under these circumstances, it is hardly compelling to argue that the testimony of this convicted accomplice would have had significant impact on his case. As the following summary shows, that testimony would at most only have duplicated appellant's and the jury would have received it with the utmost suspicion.

Appellant's story was that he left a party that night at about 12:30, went to his girl friend's house with Williams, and at about 1:15-1:30 a.m. went home and to sleep, having lent Williams his car. He was awakened once by a phone call from his girl friend and then again by Williams, who returned with his car about 4:00 in the morning. He was driving Williams home when the police stopped them and the stolen goods were found in the trunk. (Tr. 82-85.) He denied participating in the crime or knowing about the stolen goods. (Tr. 86-87). In support of his defense, appellant's sister testified she

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[3] Appellant's counsel stated Williams' appearance was "much to my surprise," and "I never thought Williams would come down, but he has appeared this morning." (Tr. 60, 58-9, 80).

saw appellant in bed asleep at 2:00 a.m. when she returned from a date (Tr. 71), and his mother testified she awoke after he returned and saw him in bed at about 2:00 a.m. (Tr. 96). Both heard the phone ring about 2:15 a.m. (Tr. 72, 98). In addition, an old friend testified he came around to appellant's house at about 3:15 a.m. to borrow his car, and upon knocking and entering, saw appellant asleep and went out (Tr. 75). Appellant's girl friend testified she saw appellant at the time he described and called him at home at about 2:10 a.m. (Tr. 92-93).

Appellant's counsel summarized Williams' putative testimony as follows: "I think his testimony will be that Young was not with him and that subsequently he went to Young's house and Young was driving him home." (Tr. 58). This cursory kernel shows Williams' testimony would have added nothing except another mouth to appellant's own story; it would have been "merely cumulative" and would have injected nothing new into the case. See *Ray* v. *United States*, 352 F.2d 521 (5th Cir. 1965); *cf. United States* v. *White*, 324 F.2d 814, 816 (2d Cir. 1963). This circumstance, coupled with the uncertainty that Williams would ever appear and the fact stressed by Judge Matthews that many continuances had already been obtained, see *Leino* v. *United States*, 338 F.2d 154 (10th Cir. 1964), amply support the decision to proceed on with trial. Either a continuance or a mistrial would have been unjustified.

United States v. *White*, *supra*, relied upon by appellant, does not impede this conclusion. There the defendant was indicted for the sale of narcotics and at trial sought to advance entrapment as his sole defense. The only other observer of the incident was the government's informer, who was "sick" at the time of trial, and a doctor testified that he definitely would be available in "a couple of weeks." Defendant's motion for adjournment was denied, but this was subsequently reversed. The court said that "There was no other way for appellant

to substantiate his defense. Thus, the testimony sought to be adduced would not have been merely cumulative and would (have) done more than impeach the Government witnesses. * * * Entrapment, if he could prove it, was his only hope." (*Id.* at 815-16). In these circumstances, the court correctly concluded that an adjournment for "a couple of weeks * * * would not have been an unduly burdensome hiatus in the trial." (*Ibid.*).

The fixed, short time element in *White* sharply marks it off from this case. Here the only issue was whether the presumption of crime arising from recent possession of stolen goods was effectively rebutted by appellant's story of non-participation. The jury could have believed all witnesses but appellant and still have convicted him. Williams, an accomplice in the crimes, would have added little by testifying in corroboration of appellant's story.

II. The trial court properly exercised its discretion in refusing to exclude evidence of appellant's prior conviction introduced to impeach his testimonial credit.

(Tr. 77-80, 90-91)

Before appellant took the stand in his own behalf, his counsel sought to have the trial court rule that his 1962 conviction for assault with intent to commit carnal knowledge could not be used to impeach him under *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). Counsel informed the court that appellant was sentenced under the Federal Youth Corrections Act, and that convictions under that act are expunged upon satisfactory termination of parole. In other words, appellant "might not have a conviction in the future." (Tr. 78.) He was then on parole. His counsel argued further that the prior crime was "not like" the crime for which he was then on trial. Appellant had been charged with carnal knowledge and pled guilty to the lesser included offense of assault with intent to commit carnal knowledge. (Tr. 79.) The victim was "a girl under 16" and the of-

fense "might have been statutory," although he didn't "know what the facts were." Appellant's counsel stated that "we have a situation where a defendant was charged with two very serious offenses and I submit that a conviction of that type, assault with intent to commit carnal knowledge where it may be a statutory type of offense, certainly cannot be used to impeach the credibility of the defendant." (Tr. 79-80). *"The Court*: You know, since Luck, everybody who comes in here who has a defendant who has been convicted, there is not one single one who thinks his conviction should come in. *Mr. Garber*: I realize that, Your Honor. If he had been convicted of grand larceny, I might not have too much standing. He was a defendant that apparently the Judge who sentenced him felt that it would merit the consideration of the Youth Correction Act and it is a question of trying to balance the scales." (Tr. 80.) Appellant had also been convicted of another crime but it was in the "process of appeal" and could not be inquired into. *Campbell* v. *United States*, 85 U.S. App. D.C. 133, 176 F.2d 45 (1949). After this hearing, appellant's request was denied (Tr. 80), and subsequently he was asked about the offense. (Tr. 90-91).

The record amply discloses that Judge Matthews considered many factors before ruling against appellant on the admission of his prior conviction. The "nature of the prior crime" (*Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763, 769 (1965)) was probed and even its "equitable" circumstances pryed into; that prior crime was different from the one at trial. The fact appellant was sentenced under the Youth Corrections Act, a factor indicated by this Court to be "highly relevant" to the determination of admissibility (*Brown* v. *United States*, No. 20,041, November 10, 1966 (slip op. at 8, n. 10)), was discussed, as was the circumstance that he had pled guilty to a lesser offense. Both the prosecution and the defense agreed that the prior crime was "very serious." (Tr. 77, 79). It was also quite recent. Although the court gave no reason for denying appellant's request, it is apparent

that the denial was based upon "individualized considerations," not "abstractions" (*cf. Brown, supra* at 5-6), and that the utmost "discretion" was employed.

In *Luck*, this Court indicated that in exercising "discretion," "a number of factors might be relevant * * *. The goal of a criminal charge is the disposition of the charge in accordance with the truth. The possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective. The experienced trial judge has a sensitivity in this regard which normally can be relied upon to strike a reasonable balance between the interests of the defendant and of the public. * * * The matter is, we reiterate, one for exercise of discretion; and, as is generally in accord with sound judicial administration, that discretion is to be accorded a respect appropriately reflective of the inescapable remoteness of judicial review." *Luck* v. *United States*, *supra* at 769. The prior offense here was a felony (*cf. Clawans* v. *District of Columbia*, 61 App. D.C. 298, 62 F.2d 383 (1932); *Pinkney* v. *United States*, No. 19,925, July 8, 1966 (D.C. Cir.)) involving moral turpitude", which would have disqualified appellant as a witness at common law. See McCORMICK, EVIDENCE § 43 (1954); 2 WIGMORE, EVIDENCE, § 575 (3d ed. 1940); see also *Campbell* v. *United States*, 85 U.S. App. D.C. 133, 135, 176 F.2d 45, 47 (1949). It involved different circumstances than the offense for which appellant was being tried. *Cf. Brown v. United States*, *supra* at 4. *Luck's* concern lest the appellate courts become stuck in the enveloping factual mire of each case is highly relevant here, where the balancing of factors was intricate and detailed. Under the statute governing the admission of prior convictions, which Congress enacted long ago, it was thought until *Luck* that the prosecution had total power to admit them (D.C. Code § 14-305). Certainly no construction of the statute allows courts to absolutely forbid all prior convictions from coming into evidence; discretion must be the rule. The function of this Court is to

provide standards and guidelines for the exercise of this discretion by trial courts, and this has been done. Once it is determined that discretion has in fact been exercised upon the "individualized considerations" of each case, this Court's function should be terminated. Since "discretion" was appropriately invoked and exercised in this case, this Court should, "in accord with sound judicial administration," arrest its inquiry at this point. See *Luck* v. *United States*, *supra* at 769; *Trimble* v. *United States*, No. 19,942, September 15, 1966 (Slip op. at 3).

This Court has recently declared that "where inferences founded upon unexplained acts are likely to be heavily operative, the court's discretion to let the jury hear the accused's story, unaccompanied by a recital of his past misdeeds, may play an important part in the achievement of justice." *Smith* v. *United States*, No. 19,629, March 9, 1966 (slip op. at 3). The remark was dictum, for *Smith* involved a pre-*Luck* trial where no judicial discretion was involved. See also *Hood* v. *United States*, No. 19,650, June 30, 1966. Also, the defendant had never taken the stand. Of course in the present case, besides the inference from recent possession of stolen property, appellant's car was also positively identified as that used in the crime. But even so, *Luck's* concern for appellate detachment from the multitude of hair-line factual variations presented by each case involving prior convictions suggests that *Smith's* dictum is not a rigorous mandate to trial courts. It is another "factor" for the broth, and its violation should not invoke automatic reversal.

Were it not for some disquieting indications in the opinions, this analysis should end the tale. But as Judge Fahy recently indicated in his dissent in *Stevens* v. *United States*, No. 19,883, October 20, 1966 (slip op. at 4-5), some members of the Court appear to believe that "perhaps the evidence of a prior criminal record should be limited to a conviction which bears clearly on credibility —perjury, for example. The whole subject needs further study in the interest of the integrity of trials for crime." And this Court has remarked on a danger that the use of

prior convictions "not only permits the prosecutor to throw doubt upon the defendant's testimony regarding the facts of the case being tried, but also may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is an habitual lawbreaker who should be punished and confined for the general good of the community. *Richards* v. *United States*, 89 U.S. App. D.C. 354, 357, 192 F.2d 602, 605 (1951), *cert. denied*, 342 U.S. 946 (1952). Even cautionary instructions 'cannot prevent the jury from considering prior actions in deciding whether appellant has committed the crime charged. The courts need not rest on the assumption that juries can compartmentalize their minds and hear things for one purpose and not for another.' *Awkard* v. *United States*, —— U.S. App. D.C. ——, 352 F.2d 641, 646 (1965)." *Pinkney* v. *United States*, No. 19,925, July 8, 1966 (slip op. at 3). See also *Campbell* v. *United States*, 85 U.S. App. D.C. 133, 135, 176 F.2d 45 (1949); *Commonwealth* v. *Bonner*, 97 Mass. 587 (1867), quoted in 3 WIGMORE, EVIDENCE § 890 (3d ed. 1940).[4]

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[4] Wigmore's position on prior convictions used to impeach is somewhat unclear. He had "no hesitation" in accepting the rule that "a defendant taking the stand as a witness may be impeached precisely like any other witness." 3 WIGMORE, EVIDENCE, § 890, at 380 (3d ed. 1940), and relied upon his central tenet that "evidence admissible for one purpose is not to be excluded because it would be inadmissible for another purpose." See 1 WIGMORE, EVIDENCE § 13 (3d ed. 1940). He agreed that "the state has an overriding interest in ascertaining" the credibility of an accused who testifies in his own behalf, but he seemed to assume that only felonies would be used to impeach. 3 WIGMORE, *supra* at § 889. In another passage he said that under the general rule, "logically * * * only such instances should be used as are relevant to show a lack of truthfulness of disposition—for example, forgery, cheating, and the like." *Supra* at § 926. He was not insensitive to the dangers of the rule. See 1 WIGMORE, *supra* at § 194, p. 650.

McCormick favored the English rule and Rule 21 of the Uniform Rules of Evidence, both of which forbid any use of prior convictions to impeach credibility unless the defendant has advanced evidence in support of his credit or, under the English rule, attacked that of the prosecution witnesses. He spoke of the rule of "discretion", such as is *Luck* employs, as "the serpent of uncertainty (in) the

In *Luck*, this Court cited as "a highly desirable guide for the trial judges," Rule 303 of the American Law Institute's Model Code of Evidence, which emphasizes judicial discretion to exclude impeaching prior convictions if the "probative value is outweighed by the risk that its admission will * * * (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury * * *." *Luck* v. *United States*, *supra*, at 768-69 n. 8. However, the Court also cited to the strict English rule and quoted the similarly strict Rule 21 of the Uniform Rules of Evidence, which provides that only crimes involving "dishonesty or false statement" may be used to impeach any witness and no prior offense can be used to impeach a witness who is the accused in a criminal proceeding unless he brings forth evidence solely in support of his own credibility. Radiations from *Brown* v. *United States*, No. 20,041, November 10, 1966, reinforce the hesitant implication latent in *Luck's* citation to Rule 21. In *Brown*, the defendant was on trial for assaulting a police officer with a dangerous weapon (a knife). He requested a ruling under *Luck* on whether his 1964 conviction for assault with a dangerous weapon (a knife) could be used to impeach his credibility. The

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Eden of trial administration. * * * It seems questionable whether the creation of a detailed catalogue of crimes involving 'moral turpitude' and its application at the trial and on appeal is not a waste of judicial energy in view of the size of the problem. Moreover, it seems that shifting the burden to the judge's discretion is inexpedient, since only in a minority of cases will the judge have adequate information upon which to exercise such discretion." McCORMICK, EVIDENCE 89-94 (1954).

The federal courts generally do not seem to follow a consistent rule. The First Circuit, for example, allows only felonies to be used. *Scaffidi* v. *United States*, 37 F.2d 203 (1st Cir. 1930). There is no overriding federal statute, and the courts have developed their practices on their own.

On the efficacy of "curative" instructions, see *United States* v. *Tramaglino*, 197 F.2d 928, 932 n. 2 (2d Cir. 1952); Note, *Other Crimes Evidence*, 70 Yale L. J. 763 777 n. 89 (1961). In civil law countries and most other parts of the world of course, evidence of propensity to commit crime forms a part of the basic evidence in the case.

trial court ruled it could because of the court's "abstract" belief the defendant might lie to avoid the harsher consequences on sentencing, and he subsequently elected not to testify. This Court noted that the defendant might have been prejudiced by the admission "especially where, as here, the prior offense is a crime similar to the one on trial." (Slip op. at 4).

Brown's holding imports no radical departure from prior law. Indeed, the Court had no escape from reversal on the facts before it if it were to preserve *Luck's* discretionary rule. The trial court had ruled in favor of admission solely on the "abstract" possibility that the adverse impact of a prior conviction on the defendant's sentence would provide him with a motive to lie. Since this motive exists for all defendants with prior convictions, under this formula no prior conviction would ever be excluded: "As is obvious, should such an abstraction be permitted to prevail *Luck* would be rendered meaningless," and courts would return to the "automatic impeachment rule *Luck* sought to change." (Slip op., at 6.) *Brown* exemplifies this Court's function when trial courts fail to exercise discretion at all, and when this failure results in keeping the accused off the witness stand. Neither event occurred here.[5]

In the course of its opinion the Court said that: "The reason for exposing a defendant's prior record is to attack his character; to call into question his reliability for truth-telling by showing his prior relevant antisocial conduct." As this Court had earlier said: "the basis of the admissability of convictions always was and always should be grounded upon the theory that the depraved character of persons who commit crimes involving moral corruption makes them unworthy of trust in testifying." *Clawans* v.

[5] If the Court rejects the argument advanced here, and treats *Brown* as an abuse of discretion case, it is distinguishable from the present case on the grounds that the prior offense here was entirely different from the offense on trial, and the appellant here did tell his story to the jury. Whatever prejudice might have ensued was of a radically different degree than in *Brown*.

District of Columbia, 61 U.S. App. D.C. 298, 299, 62 F. 2d 383 (1932). See also 1 WIGMORE, EVIDENCE § 194, at 650 (3d ed 1940). It is impermissible, therefore, to consider a motive to falsify in deciding admissibilty, for all defendants have such a motive—to escape punishment—and the jury is carefully instructed on this inevitable "interest." *Brown*, *supra* at 6.[6] The court then indicated that in balancing the factors indicated in *Luck* the trial judge "should focus on just how relevant to credibility a particular conviction may be." (citing to Rule 21's "dishonesty or false statement" standard and the stricter Model Code of Evidence Rule 106). "While one who has recently been convicted of perjury might well be suspected of lying again under oath, the fact that a defendant accused of assault has already been convicted of assault has no such bearing on credibility. Certainly the prior assault establishes a history of violent behavior, but proof of prior violent behavior is inadmissible to prove assault." *Supra* at 6-7.

It is in this refined concept of relevancy that the radical emanations of *Brown* appear. If a prior assault with a dangerous weapon shows violent propensities but is not "relevant" to credibility, then it would follow that, at minimum, only crimes indicating "dishonesty or false statement" would be so relevant—in short, Rule 21 of the Uniform Rules of Evidence would have been engrafted, in part, into Section 14-305 of the D.C. Code.[7] This even though the Court indicated the problem was one for "the

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[6] For a history of the rule disqualifying "interested parties," see *Ferguson* v. *Georgia*, 365 U.S. 570, 573-78 (1961); 2 WIGMORE, EVIDENCE § 575 (3d ed. 1940).

[7] Crimes of "dishonesty of false statement" would presumably include perjury, subordination of perjury, conspiracy to procure the absence of witnesses, barratry, forgery, uttering forged instruments, bribery, suppression of evidence, false pretenses, cheating, and embezzlement. See Note, *Other Crimes Evidence at Trial*, 70 Yale L.J. 763, 775, n.73 (1961). It is not obvious just how much more "relevant" to the risk a particular accused will lie on the stand are crimes within this category than are those not within it, although certainly there is some increased tendentiousness.

drafter of the proposed Federal Rules of Evidence." *Supra* at 7, n.8.

Of course the rule of decision under Section 14-305 has, from its incipiency, been otherwise, and Congress has acquiesced in that construction. In *Bostic* v. *United States*, 68 U.S. App. D.C. 167, 94 F.2d 636 (1937), *cert. denied*, 303 U.S. 635 (1938), this Court held that a simple assault conviction could be used to impeach the testimony of one accused of murder. The defendant's argument that only crimes conforming to the common law standard of "moral turpitude" could be used to impeach a witness was explicitly rejected by this Court, which construed the statutory term "crime" to include the misdemeanor of simple assault. In this construction the Court was following *Murray* v. *United States*, 53 App. D.C. 119, 288 F. 1008, *cert. denied*, 262 U.S. 757 (1923), in which five prior misdemeanors, the last of which had occurred ten years before, were allowed to impeach the accused in a felony trial. And in *Goode* v. *United States*, 80 U.S. App. D.C. 67, 68, 149 F.2d 377 (1945), this Court approved the use of two prior grand larceny convictions to impeach a defendant accused of the sale of narcotics, "irrelevant though they may appear to be * * *." *Richards* v. *United States*, 89 U.S. App. D.C. 354, 192 F.2d 602 (1951), *cert. denied*, 342 U.S. 946 (1952), presented the issue of whether a prior conviction for which the defendant had been pardoned under a general amnesty was properly used to impeach him, and this Court held it was: "Since the rule is statutory in the District of Columbia, there may be real doubt as to our power to create such an exception (for pardoned offenses)." The "basic purpose and reasoning of the legislation (is) that when the jury comes to assess the truth of any man's testimony it should be allowed to consider his previous criminal activity and its impact on his trustworthiness. * * * If the general rule permitting impeachment of a defendant is valid, *and we are bound so to consider it*, then we think it follows that we should not create an exception in cases of the present sort." *Supra* at 357, 359 (emphasis supplied). In *Campbell* v. *United States*, 85 U.S. App. D.C. 133, 176 F.2d 45 (1949),

this Court held that prior convictions not yet final could not be used to impeach, and in dictum indicated dissatisfaction with the holdings in *Murray* and *Bostic* that misdemeanors outside the penumbra of the common law standard of "infamous crimes involving moral turpitude" could be so used. "But we are not disposed to disturb a statutory construction which has been followed for more than a quarter of a century, especially since Congress has not seen fit during that long period to manifest dissatisfaction with it by amending the Code provision. Under that interpretation, if Campbell had been finally convicted of petit larceny, it was not error to allow that fact to be elicited from him by cross-examination or to be shown by evidence aliunde." *Supra* at 135. Finally, *Luck* itself sanctioned the use of a prior grand larceny in a prosecution for housebreaking and larceny, this Court holding the issue on retrial was "to be decided according to (the trial court's) best justment in the light of the record as it develops before him." *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763, 769 (1965).

Prior convictions not within the scope of Rule 21's "dishonesty or false statement" standard have thus been consistently allowed by this Court to impeach defendants under § 14-305, and with the responsibility for this construction and its alteration squarely upon Congress, this Court may not repudiate this rule. See, *e.g.*, *Trimble* v. *United States*, No. 19,942, September 15, 1966; *Bostic* v. *United States*, *supra*. *Brown* held simply that "discretion" imports "individualized considerations" and not "abstractions" which would apply to every case; its result was necessary to preserve the integrity of the discretionary rule. Its holding does not violate the plain message of legislative silence in the wake of *Murray*, *Bostic*, *Campbell*, *Trimble* and *Luck*.

Since *Brown's* dictum cast some fog over the law of prior convictions under D.C. Code § 14-305, this Court should now dispel it. It is apparent that prior convictions which do not fall within the ambit of Rule 106 of the Model Code of Evidence or Rule 21 of the Uniform Rules

of Evidence are nonetheless "relevant" under § 14-305 to the truthtelling capacity of a defendant who takes the stand, under the traditional notion that such defendants have once evidenced their disregard for the law and may well do so again. Such relevance is indisputable in view of the universal rule that a defendant may introduce similar evidence of good character to show his lack of propensity to commit crime. Judicial "discretion" to exclude must be "meaningfully invoked" by the recitation of appropriate factors. *Hood* v. *United States*, No. 19,650, June 30, 1966 (Slip op. at 4); see also *Walker* v. *United States*, No. 19,962, June 9, 1966. And once invoked, the trial court must consider only the "individualized considerations" of the case at hand, and must balance relevancy to the risk of falsehood against the risk of prejudice. *Brown*, *supra*. If this is done, in accord with its "respect appropriately reflective of the inescapable remoteness of judicial review," *Luck*, *supra* at 769, this Court will not disturb the balance so determined except in circumstances amounting to an abdication of discretion.

III. The court did not err, much less "plainly" err, in not specifically instructing the jury that one convicted of aiding and abetting must have wilfully participated in the offenses charged, since this fact was clear beyond peradventure from the charge as a whole.

(Tr. 131-35)

In this Court, appellant objects for the first time to Judge Matthews' charge to the jury because he thinks "the jury could have believed appellant's testimony but nevertheless viewed his actions, however innocent, as assistance and hence criminal under the law as the court had set it forth in the charge." (Brief for Appellant, at 25). But appellant's whole defense at trial was that he had not participated and knew nothing of the stolen goods. And Judge Matthews paraphrased the aiding and abetting law in language which clearly denoted an element of

intent.[8] She then said: "If two people together commit an offense and they join in committing an offense, then each is responsible just as though he did all of the physical acts involved in the criminal undertaking. In other words, if one person aids or abets, that is, assists or helps another person in the commission of a crime, the person so aiding or abetting is guilty of the completed offense as though he had, himself, committed it entirely." (Tr. 131-32). Although it is literally possible to distort the plain meaning of this paragraph in the manner appellant does here, and come up with the meaning that one may violate the law by innocently "assisting or helping" a criminal endeavor, such a distortion requires the jury to believe and act upon a law punishing innocents which revolts every common canon of decency and justice. Common sense compels recognition that not even the most callous jury would so construe this law or act upon it. Appellant's argument on this point is imaginative, but specious.

Moreover, his argument requires that the jury pluck out one passage in a long instruction from a context pregnant with the meaning he denies. Immediately following the passage quoted, Judge Matthews read and summarized the indictment and quoted the statutes violated in words which hammered home the necessity for a criminal intent. The indictment charged appellant and Williams with having "entered * * * with intent to steal" and with "stealing" the property subsequently found. (Tr. 132.) The statute defining "housebreaking" proscribes entering "with intent to commit any criminal offense * * *". Judge Matthews summarized the "essential elements" of the

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[8] Now, we have in the District of Columbia a law which is referred to as the aiding and abetting law. This law provides that, in a prosecution for any criminal offense, any person aiding or inciting or conniving at the offense, or aiding or abetting the principal offender, shall be charged as a principal. You are told that a person who advises, incites or connives at any offense, or aids or abets the principal offender, is himself a principal offender under this law; in other words, such a person is just as responsible under the law as the person who commits a physical act which violates the law. (Tr. 131.)

crime of housebreaking as the (1) entering of a building (2) owned by another (3) "with the intent to steal the property of another." (Tr. 133). She reiterated the necessity for the jury to find each of these elements to have been established beyond a reasonable doubt. And "under this aiding and abetting law about which I spoke to you, a person commits a criminal offense if he, himself, does the things that constitute the criminal act, or if he aids or abets another to do so." (Tr. 134). She then summarized the grand larceny count as the (1) "unlawful" taking of property belonging to another (2) valued in excess of $100 (3) "with the fradulent intent to convert it to his own use." (Tr. 134). This element of intent was reiterated twice more immediately thereafter. (Tr. 135).

It is obvious that this charge hammered home the need that a criminal intent be proven beyond a reasonable doubt in order to convict appellant as an aider and abettor. Although many words were used in the trial court's definitions of "aid and abet", all words denoting active participation in "wrongdoing," [9] the gist of it lies in the notion that one aiding and abetting "is just as responsible under the law as the person who commits a physical act which violates the law." (Tr. 131). This is a rule of equality; it is ridiculous to suppose that an aider and abettor could be punished for possessing an innocent intent while the principal with such an intent would go scot free. Yet this is the supposition which appellant contends the jury might have adopted. Only a jury of feeble wits would do so, and our Constitutional guarantee supposes a more noble institution. Appellant never challenged its composition on that ground at trial, as he similarly failed to object to Judge Matthews' charge on the ground of his present objection.

The charge here plainly communicated that appellant had to have actively participated in the venture "as in something that he wishes to bring about" before he could

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[9] *Webster's New World Dictionary* defines "abet" as "to incite, sanction, or help, especially in wrongdoing."

be found guilty as an aider and abettor. *Nye & Nisson* v. *United States*, 336 U.S. 613, 619 (1949), quoting L. Hand, J. in *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). *Cf. United States* v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962); *United States* v. *Byrd*, 352 F.2d 570 (2d Cir. 1965); *Moore* v. *United States*, 356 F.2d 39 (5th Cir. 1966); *Long* v. *United States*, —— U.S. App. D.C. ——, 360 F.2d 829 (1966); *Cooper* v. *United States*, —— U.S. App. D.C. ——, 357 F.2d 274 (1966). In *Cooper*, the trial judge in his summary mistakenly said that the defendant had been identified "as one of the three persons who attacked and robbed" the victim, while in fact the defendant had been merely spotted at the scene of the events. In these circumstances "the jury was specifically told that knowledge was sufficient for guilt," *supra* at 279, instead of participation in a more active sense. In *Garguilo*, the instructions and explanations highlighted mere knowledge of the crime rather than the "purposive participation" necessary under the law, and the jury had asked specifically for clarification on the point. *Supra* at 254-55. In *Kemp* v. *United States*, 114 U.S. App. D.C. 88, 311 F.2d 774 (1962) *(per curiam)*, the evidence against the defendant only showed that he rode in a stolen car driven by a friend who had driven him before in his brother's car. The Court said that the defendant's use of the automobile "was as consistent with innocence as with guilt," and that to infer "guilty knowledge" was an "impermissible speculation" on those facts. *Supra* at 89. The situation there hardly parallels the one here, where appellant was found a few minutes after the crime driving his own car with the stolen goods secreted in his trunk.

None of these cases nor any cited by appellant support his contention that Judge Matthews' charge was erroneous in the respect now criticized. It clearly instructed them properly as to the need to prove intentional assistance as an aider or abettor. There was no error committed, much less the "plain error affecting substantial rights" necessary in this case to invoke this Court's power under Rule 52, FED. R. CRIM. P.

IV. The charge as a whole did not unduly emphasize the government's side of the case.

(Tr. 103, 126-39, 142)

At the close of the court's charge to the jury, appellant's trial counsel objected to the trial court's "recharging the jury on the inference on the recently stolen property" on the ground that doing so "militates against the defendant." (Tr. 142). In response, the court charged the jury that they were "not to single out some particular instruction and accentuate that and overlook others," but rather were to "consider it in its entirety." (Tr. 142). Appellant now argues that "the charge, taken as a whole, instructed the jury almost entirely on the government's theory of the case, and almost nothing was said concerning appellant's defense, certainly not of its specifics." (Brief of Appellant at 25-6). Appellant never asked for any special instructions before the charge (Tr. 103) and certainly did not object at trial to any preponderance of the charge in the government's favor. He could not have, because there was none. The vast bulk of the charge concerned the law for the violation of which appellant was on trial. (Tr. 126-38). One page, equally divided, concerned the evidence in the case for both sides (Tr. 138-39). Every instruction sought by appellant's counsel was given by the court. The charge was not only correct; it was fair and reasonable. It neither prejudiced the appellant in any way nor forms the basis for a challenge to his conviction under the "plain error" rule. Fed. R. Crim. P. Rule 52.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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JOHN A. TERRY,
HENRY F. FIELD,
Assistant United States Attorneys.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,269

United States Court of Appeals
for the District of Columbia Circuit
FILED MAY 1 1967
Nathan J. Paulson
CLERK

JOSEPH YOUNG, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

PETITION FOR REHEARING EN BANC

On April 14, 1967 a division of this Court announced its opinion affirming, per curiam, Appellant's housebreaking and larceny conviction in the District Court. Joseph Young, Jr., Appellant, by his undersigned attorney herewith respectfully requests the Court en banc to reconsider and rehear his appeal, and in support of his petition respectfully shows as follows:

Appellant requested review of three procedural rulings of the trial court, contending that each of the rulings was erroneous and that their cumulative effect was to deprive him of an adequate opportunity to

present his defense and, hence, of a fair trial. The rulings in issue were (1) the trial court's refusal to grant a mistrial or continuance when a witness whose testimony would have exculpated Appellant became temporarily unavailable; (2) the court's subsequent and related rejection of a request by Appellant that, in view of the unavailability of the person who would have been his key witness, he be allowed to testify in his own defense without being exposed on cross-examination to reference by the prosecutor to an earlier conviction for the crime of assault with intent to commit carnal knowledge; and (3) the trial court's failure, in its instructions on the crime of aiding and abetting, to apprise the jury that the government must prove criminal intent and purposive participation.

The one-paragraph opinion of the sitting division of this Court affirming Appellant's conviction contained no reference to the first or third issues on appeal. It disposed of the second issue on the ground that the record "clearly" shows that the trial judge exercised the discretion required by this Court's opinion in Luck v. United States, 121 U. S. App. D.C. 151, 348 F. 2d 763 (1965). The opinion added that the trial judge "demonstrated knowledge" of the Luck case and that Appellant's unsuccessful invocation of its doctrine was "debated at some length in the trial court".

Appellant requests en banc reconsideration of the opinion of the sitting division on the ground that, on the facts at bar, it improperly restricted the scope of the appellate review necessary for a determination

that the exercise of sound trial court discretion required by this Court's Luck opinion in fact occurred. The question presented is of general significance because the sitting division's perfunctory disposition of the issue appears to sanction an undesirable retreat, in practice, from the salutary principle enunciated for the guidance of trial courts only a short time ago in the Luck decision, and to conflict with other cases which have arisen since Luck raising cognate problems as to the scope of appellate review necessary to assure compliance by the District Court with the Luck doctrine.

I.

Proper appreciation of the sitting division's affirmance of the trial court's ruling on Appellant's Luck objection requires reference to the unusual factual setting in which the point arose. The housebreaking and larceny which led to Appellant's arrest occurred early in the morning of August 21, 1965. An eyewitness to the crime saw two men, neither of whom he could identify, remove articles from an office building in Northeast Washington and drive away in an automobile, with the stolen property on the back seat. Appellant and a companion, one Thomas Williams, were arrested later in the same morning near the scene of the crime and Appellant's home, while driving in the car seen at the crime. Some (but not all) of the stolen property was found by police secreted in the trunk of the car after the arrest. Appellant's position at

trial was that Williams had borrowed the car from him earlier in the morning, had later returned with it, and that Appellant was driving Williams home at the time of the arrest, not knowing that the car had been used in the commission of a crime and that some of the stolen goods were still in its trunk. The government's case against Appellant was based entirely on the foregoing circumstantial evidence and on the inference to be derived from recent possession of stolen goods.*

Appellant and Williams were both indicted for housebreaking and larceny. Prior to Appellant's trial Williams pleaded guilty to the larceny — a plea fully consistent with Appellant's defense — and at the time Appellant was brought to trial Williams was awaiting sentencing at which the government had indicated that, according to the normal "plea bargain" in such cases, the housebreaking count against him would be dismissed. On the morning of Appellant's trial Williams appeared and offered to testify in his behalf. It is apparent from statements by Appellant's counsel at trial (Tr. 58-59), as well as from a subsequent affidavit by Williams himself lodged with this Court during the appeal proceedings,** that Williams' testimony, if believed by the jury, would have supported Appellant's defense in all respects, confirmed Williams' responsibility for the offense, and

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* See Appellant's Br., pp. 2-7.

** By Order entered April 12, 1967, the sitting division granted Appellant's motion to lodge the Williams affidavit.

fully exculpated Appellant. When he appeared and offered to testify, however, the trial court and counsel raised for the first time the question of his possible self-incrimination implicit in the fact that the housebreaking count against Williams had not yet been technically dismissed by the government. When Williams' own attorney was summoned to advise him on the matter, he pointed out that the government could, at least in theory, revive the dormant housebreaking count against Williams at any time prior to his sentencing, and had in fact threatened to do so if he testified (Tr. 63). Thereupon Williams changed his mind and decided not to testify for Appellant. Appellant's motion for a mistrial or continuance until Williams' testimony, obviously critical to his defense, became available was denied by the trial court, thus leaving Appellant without his principal witness (Tr. 65-67).

It was in this unusual context that Appellant's request to the court for exercise of its discretion to exclude his prior carnal knowledge conviction arose. The per curiam order of the sitting division in this case stresses the fact that Appellant's invocation of the Luck doctrine was "debated at some length in the trial court". There is attached hereto as Appendix A the full text of the "debate" to which the sitting division referred. In this colloquy, Appellant's counsel pointed out that he was confronted with a most unenviable procedural quandary in that the only witness who could give direct evidence of his whereabouts at the time of the crime had become unexpectedly unavailable as the result of the trial

court's prior ruling; that the earlier crime which Appellant sought to have excluded from cross-examination by the government was the only criminal offense of which he had been finally convicted; that he had been sentenced pursuant to the Federal Youth Corrections Act, a rehabilitating procedure designed to lead to ultimate expunging of any record of the offense altogether; and that the earlier crime had obviously slight (if any) relevance to Appellant's testimonial credibility, on the one hand, and, on the other, was of an inflammatory nature inevitably calculated to prejudice the jury (Tr. 76-80).

In response to all of these contentions by Appellant, which severally and jointly established a persuasive showing of the type of situation which, under this Court's Luck opinion, justifies exclusion by the trial court of references to a past conviction, government counsel merely responded that "a conviction of a crime as serious as that . . . is something that the jury should properly consider as affecting his credibility" (Tr. 77).

During the colloquy the trial judge observed that, in the Luck case, this Court "didn't do anything. . .they just talked", and that since Luck "everybody who comes in here who has a defendant who has been convicted, there is not one single one who thinks his conviction should come in" (Tr. 80). The only comment by the trial court responsive to the merits of Appellant's argument that the Luck doctrine should be invoked in his defense related to Appellant's contention that his earlier carnal knowledge offense was

inherently inflammatory in nature.* With this assertion the trial judge agreed, since she suggested on her own motion to the prosecuting attorney that he refer to the earlier offense merely as a conviction for assault — a suggestion to which the prosecutor promptly demurred (Tr. 79). Thereupon the trial court rejected Appellant's request in its entirety, merely stating "I believe I ought to deny your request", and giving no reasons for her decision (Tr. 80).

Thus the challenged ruling of the trial court came to the sitting division reviewing this case on a record which showed an obvious lack of sympathy with this Court's Luck opinion by the trial court; a discussion by counsel in which all criteria considered supported invocation of the Luck principle so as to exclude reference to the past conviction;** an explicit recognition by the trial judge, in the form of a sua sponte suggestion to the prosecutor, of the inherently prejudicial nature of the prior offense; and an ultimate ruling which gave no indication whatsoever either that the trial court viewed the matter as one for the exercise of her discretion or, if she did, the basis or reasoning upon which that result was reached.

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* The petit jury which was allowed to consider the effect of Appellant's conviction for assault with intent to commit carnal knowledge contained six women (Tr. 11).

** The government's contention that Appellant's past conviction should have been admitted against him merely because it involved a "serious crime" was, of course, entirely unresponsive to the criteria outlined by this Court in Luck as relevant to the question of admissibility. Indeed, Luck makes it clear that, in some circumstances, the more serious the prior offense the more reason there is for its exclusion.

II.

In the circumstances of this case, it appears that the sitting division was of the view that whenever one or more of the factors required to be considered by the trial court in the Luck case is canvassed on the record at the time the objection is made below, and it further appears that the trial judge has "knowledge of" the Luck decision, it must be assumed that the trial court exercised the requisite discretion and no further appellate review of the matter is appropriate. This was the extreme position advanced to the sitting division in this case by the government's brief.*

Any such reading of Luck, however, would go far to render the important procedural rule it announced a nullity as a practical matter. Under this test, this Court would rarely, if ever, be called upon to grant new trials because of the improper and prejudicial use of past convictions for "impeachment" purposes by the government. It may confidently be assumed that all trial judges in this Circuit have "knowledge of" this Court's Luck opinion, and it is equally to be expected that the criteria for exclusion of prior convictions outlined therein will always be referred to by defense counsel seeking to invoke the trial court's discretionary authority under Luck. At least where, as in this case, the trial court gives no reason for its ruling on a Luck objection, this Court on review should require, not

*Gov't. Br., pp. 3-4, 12-13.

merely a showing that the trial judge was aware of the Luck opinion and that its criteria were discussed by counsel, but also that the ruling itself bears a reasonable and rational factual relation to those criteria. Otherwise the trial courts' administration of the rule in such cases will be, in effect, unreviewable.

Brief as it is, the per curiam opinion of the sitting division in this case is in conflict with at least two decisions by other divisions of this Court since Luck, both of which indicate clearly that, in administering the Luck doctrine, this Court will not only inquire as to whether discretion has been exercised, but will also review the evidence to the extent necessary for a determination that the exercise was not arbitrary. See Brown v. United States, ____ App. D.C. ____, 370 F. 2d 242, 243-45 (1966); Brooke v. United States, Case No. 20,241, decided April 19, 1967, slip opinion, pp. 10-12. In both of these cases, the second of which was decided subsequent to the opinion in this case, the challenged ruling was examined in light of the specific standards enunciated in Luck, whereas the per curiam opinion in this case held merely that all that is required was that the trial judge have "knowledge of" the Luck opinion and that the relevant criteria be "debated" in the record at the time of the ruling.

Any examination of the reasonableness of the ruling below in this case in terms of the evidentiary factors required to be considered under Luck requires the conclusion that the ruling constituted an abuse of discretion. This is so-since all relevant factors militated in favor of, rather than against,

exclusion of Appellant's past conviction:

1. The government's case against Appellant rested in its entirety on "inferences founded upon unexplained acts", and hence the situation was particularly of the sort where it was desirable for the Court "to let the jury hear the accused's story unaccompanied by a recital of his past misdeeds" (Smith v. United States, 123 App. D.C. 259, 260-61, 359 F. 2d 243, 244-45 (1966)).

2. Not only was the government's case entirely dependent upon the inference to be derived from Appellant's being found in possession of recently stolen goods, but the Court's earlier ruling had the effect of depriving him of the testimony of the only witness (other than himself) who could explain his whereabouts, thereby virtually forcing him onto the witness stand in his own defense.

3. The offense which Appellant sought to have excluded was at the time the only previous crime for which he had been finally adjudicated guilty, and hence he had no lengthy criminal record (Luck v. United States, 121 App. D.C. at 156).

4. The earlier offense had occurred while Appellant was a juvenile, and at the time of his trial in this proceeding Appellant was still a youth (Id. at 157).

5. Appellant had been sentenced after the earlier conviction pursuant to the rehabilitative Youth Corrections Act, a factor declared by this Court to be "highly relevant" to favorable consideration of a Luck objection (Brown v. United States, supra, 370 F. 2d at 245-46, fn. 10).

6. The prior offense which Appellant sought to have excluded was of doubtful, if any, relevance to his credibility (Id. at 244-45).

7. The prior offense which Appellant sought to have excluded was of a nature inherently calculated to inflame the jury against him, as recognized by the trial court (Tr. 80).

Against the foregoing impressive array of factual considerations favoring a grant of Appellant's motion to exclude reference to the prior conviction, neither the prosecutor nor the trial judge advanced a single

relevant consideration tending to tilt the scales in the other direction. Thus, no factual basis can be found in the record for an exercise of trial court discretion adverse to Appellant on the point.

III.

The need for the entire Court to reconsider and clarify the scope of review of the trial court ruling under Luck in this case becomes all the more apparent when the challenged ruling is considered in light of the use to which the prosecutor put it at later stages of the trial and the patent defect in the Court's instructions to the jury, raised as a separate issue in this appeal. As noted above, the prosecutor refused to accept the trial court's suggestion that the inherently inflammatory nature of his proposed reference to Appellant's prior carnal knowledge conviction might be blunted if he were to refer to the conviction simply as one for "assault". Having obtained carte blanche to introduce the prior conviction against Appellant, the prosecutor then skillfully capitalized, in his summation to the jury, on the twin themes that (1) Appellant did not produce any independent testimony from other witnesses to corroborrate his own testimony at the trial (when the fact was that he had been prevented from doing so by the court's earlier ruling in reference to the witness Williams), on the one hand, and (2) Appellant himself was not to be believed because of the past conviction, on the other (Tr. 112-13; 123). The pertinent portion of the prosecutor's summation to the jury is attached hereto as Appendix B. It illustrates precisely the type of inflammatory use of a prior conviction

against which this Court cautioned in the Luck case, and provides a classic example of a situation in which "the cause of truth" (Luck v. United States, 121 App. D.C. at 156) was hindered, rather than helped, by the evidence of prior conviction.

The prosecutor's misleading and inflammatory summation to the jury was only compounded by the failure of the trial judge, in instructing the jury, to advise it that guilty knowledge and purposive participation are essential elements of the crime of aiding and abetting, as required by Nye and Nissen v. United States, 336 U.S. 613, 619 (1949) and United States v. Peoni, 100 F. 2d 401, 402 (2d Cir. 1938). Instead, in response to the prosecutor's specific request for a charge on aiding and abetting (Tr. 104), the court did little more than paraphrase for the jury the applicable statute (D.C. Code, Title 22, Section 105) (Tr. 131-32, 134). Careful, accurate instructions on the aiding and abetting statute were particularly necessary in this case because Appellant had admitted aiding the co-indictee at least to the extent of lending him his car and, later on, driving him home. With uncontroverted proof that the items found in Appellant's vehicle were stolen property, the jury could have believed Appellant's testimony that he was unaware that he was participating in a crime but nevertheless viewed his actions, however innocent, as assistance and hence punishable under the law as the court had set it forth in the charge. In such a situation, the danger of substantial prejudice to Appellant's case

from the prosecutor's repeated references to his past conviction was compounded.

IV.

For the foregoing reasons, Appellant respectfully requests that the Court en banc reconsider the per curiam opinion of the sitting division in this case and hold, consistently with its recent Brown and Brooke opinions, that, for purposes of appellate review of trial court exercise of discretion in ruling on Luck objections, the inquiry does not end when it appears that the trial judge has knowledge of the Luck case and that one or more of the criteria outlined therein were discussed by counsel, but must also include an appraisal of the ruling in light of the known evidentiary factors and a determination that, under the circumstances, the ruling was not arbitrary and capricious. Under this test, Appellant's conviction in this case should be set aside.

Respectfully submitted,

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800 World Center Building
Washington, D.C. 20006

Attorney for Appellant
(Appointed by this Court)

May 1, 1967

APPENDIX A

Excerpt from Trial Transcript, p. 76, line 23 through p. 80, line 11:

"MR. GARBER [attorney for Appellant]: In view of the situation that developed with the witness Thomas Williams, the question now arises as to whether or not the defendant, himself, will take the stand. There are two considerations that I think should be brought to the attention of the Court, No. 1, this defendant had a previous conviction in this court on a charge of assault with intent to commit carnal knowledge back in 1962. He was sentenced under the provisions of the Federal Youth Correction Act and is presently on parole. Of course, that type of crime is not like this type and I would request that if this defendant takes the stand that that conviction could not be inquired into.

MR. TERRY [attorney for the government]: Your Honor, under the Luck case, this is of course a matter for Your Honor's discretion. We feel that a conviction of a crime as serious as that particularly is something that the jury should properly consider as affecting his credibility if he should take the stand.

THE COURT: Is that the only one he has?

MR. GARBER: Well, he had another one in Maryland but I understand, from what the defendant tells me, that that is in process of appeal so he couldn't be asked about that anyway. I have no direct knowledge of that, but what I understand from the defendant and his counsel out there is steps were taken to appeal that conviction and I believe they have got an appeal bond set.

MR. TERRY: Is that the one he is currently serving sentence on?

MR. GARBER: That is the one and under those convictions, I don't believe that could be inquired into, although I don't know for a fact but from what he tells me, it wouldn't be a final judgment because the case is in process of appeal. But I understand this assault with intent to commit carnal knowledge is the only conviction he has.

I say he was sentenced under the Federal Youth Correction Act. The effect of this law, as I understand it, is on completion of the period of his parole, a certificate would be filed expunging that from the record.

MR. TERRY: Unless the parole is revoked.

MR. GARBER: If it is revoked, that is something in the future. So we are faced with him, technically, having one now and he might not have a conviction in the future. As I say, it is a consideration in his taking the witness stand and under the Luck case --

THE COURT: Oh, I remember the Luck case. They didn't do anything in that case, they just talked.

MR. GARBER: I believe in the Luck case, as I understand it, the Judge in that case felt that he was required -- I shouldn't say required, I don't want to usurp his language -- but I understand he felt he had no discretion if the attorney asked about the conviction; the Court of Appeals held he did have discretion.

We have the consideration of the defendant taking the stand --

THE COURT: It is very hard for the reporter to hear you. What about the matter of showing the assault without -- you wouldn't say simple assault, but just assault?

MR. TERRY: It wasn't simple assault.

THE COURT: I know it wasn't, you wouldn't say simple assault, but simply say assault?

MR. TERRY: He was charged with carnal knowledge and he entered a plea of guilty to assault with intent to commit carnal knowledge, a lesser offense.

MR. GARBER: I think it was a girl under 16, something of that sort, it might have been statutory, I don't know what the facts were but it might very well have been he didn't know the girl was under 16 years of age. There we have a situation where a defendant was charged with two very serious offenses and I submit that a conviction of that type, assault with intent to commit carnal knowledge where it may be a statutory type of offense, certainly cannot be used to impeach the credibility of the defendant.

THE COURT: You know, since Luck, everybody who comes

in here who has a defendant who has been convicted, there is not one single one who thinks his conviction should come in.

MR. GARBER: I realize that, Your Honor. If he had been convicted of grand larceny, I might not have too much standing. He was a defendant that apparently the Judge who sentenced him felt that it would merit the consideration of the Youth Correction Act and it is a question of trying to balance the scales.

THE COURT: I believe I ought to deny your request."

APPENDIX B

EXCERPT FROM PROSECUTOR'S SUMMATION TO THE JURY,

Transcript, p. 112, line 5 through p. 113, line 10:

"Ladies and gentlemen, the defendant, first of all, had nothing to back up that story except his own testimony. True, he has paraded several witnesses before you, his mother, his sister, his girl friend and other friends, Mr. Ford, all of them say yes, he was home, I saw him at home or I talked to him at home. But they can't put him at home any time after 2 or 2:30, with the exception of Mr. Ford who said he stopped by a little after 3 and discovered the defendant asleep, so he left.

When it comes down to where he was at 4 o'clock or 4:05, the time of the housebreaking, we have only the defendant's word for it.

I must remind you, ladies and gentlemen, that you will recall that on cross-examination the defendant conceded that he was indeed the same Joseph Young who had been convicted of a serious crime back in 1962, I believe it was, assault with intent to commit carnal knowledge. That conviction is offered to you ladies and gentlemen for one purpose only, that is, it is offered to indicate to you that he is not or should not be the kind of person whose testimony you should believe. In other words, ladies and gentlemen, it is offered to affect his credibility.

I ask you, ladies and gentlemen, would you be willing to take the word of a defendant, now on trial, who had been previously convicted, rather recently convicted of such a serious crime, against the testimony of other witnesses who clearly put him or at least whose testimony clearly indicates that he, indeed, was involved in this crime. I submit to you the defendant's testimony should be rejected by you."

AFFIDAVIT AND CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Petition for Rehearing En Banc" is filed in good faith and not for purposes of delay, and that a true and correct copy thereof has been deposited in the United States mail, postage prepaid, this 1st day of May, 1967, addressed to Frank Q. Nebeker, Esq., United States Attorney for the District of Columbia, Room 3834D, United States Courthouse, Washington, D.C. 20001.

Aloysius B. McCabe